Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

LUIS DUBÓN OTERO,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Sixth Amendment permit exclusion of non-English-speaking persons from federal juries in criminal trials in Puerto Rico, a jurisdiction in which the majority of the population does not speak English?

2. Does 18 U.S.C. § 666, which prohibits unauthorized conversion from an entity receiving "benefits . . . under a Federal program" of "Federal assistance," apply to conversion from a fixed-fee private contractor providing services to a municipality, three tiers removed from a federal grant, without proof of an effect on any federal program objective?

LIST OF PARTIES

Parties to the proceeding in the Court of Appeals were Luis Dubón Otero, Jorge L. Garib Bazaín and the United States. The Court of Appeals had previously affirmed convictions of three defendants who had been tried separately: Jeannette Sotomayor-Vázquez, Armando Borel-Barreiro, and Yamil Kourí-Pérez. *United States* v. *Sotomayor-Vazquez*, 249 F.3d 1 (1st Cir. 2001).

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 29, 2002.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 292 F.3d 1 and is reproduced at A. 1a.[1] The order of the Court of Appeals denying rehearing and rehearing *en banc* is unreported and is reproduced at A. 29a. The District Court's opinion of October 27, 1999, is reported at 76 F. Supp. 2d

[1] Citations to "A." are to the appendix hereto; to "J.A." to the Joint Appendix filed in the Court of Appeals; to "Tr." to the transcript of proceedings in the District Court.

161 and is reproduced in relevant part at A. 34a. The District Court's opinions of January 25, 1999, January 11, 2000, and March 3, 2000, are unreported and are reproduced at A. 31a, 37a and 46a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered May 29, 2002. A. 1a. Its order denying a timely petition for rehearing and rehearing *en banc* was entered July 23, 2002. A. 29a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, and the Sixth Amendment to the Constitution of the United States, 18 U.S.C. § 666, 28 U.S.C. §§ 1861, 1862 and 1865, and 48 U.S.C. § 864 are reproduced in the appendix at A. 66a.

STATEMENT

Advanced Community Health Services, Inc. (ACHS, Inc.) was incorporated in 1987 as a private corporation "for pecuniary profit" to operate clinics, pharmacies, and provide an array of medical services. J.A. 284. Petitioner was a major shareholder, director, and legal adviser of ACHS, Inc.

Beginning in 1988 ACHS, Inc., contracted with the Municipality of San Juan, Puerto Rico, for specified fees to establish and operate a facility and provide medical services for AIDS patients in San Juan. There was no restriction as to how ACHS, Inc., might choose to apply revenues it was paid, and ACHS, Inc., bore the entire financial risk and any profit or loss from providing the services called for. It was undisputed that ACHS, Inc., fully provided all services called for by the Municipality.[2] Pursuant to further agreement, the

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[2] The government's principal witness testified that "the accomplishments of the institute in general were always excellent, and the work was always done in an A-Number-1 fashion . . . ." Tr. 758.

Municipality paid ACHS, Inc., $70,680 in 1989 and $99,729 in 1990 for staffing and operating an assessment and intervention center for drug addicts.

In 1999, petitioner was indicted in the United States District Court for the District of Puerto Rico for conspiring to violate 18 U.S.C. § 666, which makes it a federal crime for an agent wrongfully to convert property valued at $5000 or more from any organization that

> "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."

18 U.S.C. § 666(b). The statute adds that it

> "does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business."

18 U.S.C. § 666(c). The indictment charged that petitioner and others had violated § 666 by conspiring to take money without authorization from ACHS, Inc., and spend it for their personal use or to purchase political influence.

A. District Court Proceedings.

1. Prior to trial, petitioner moved to dismiss the indictment on the ground that the jury selection process in the United States District Court for the District of Puerto Rico did not comply with 28 U.S.C. § 1861 and the Sixth Amendment to the Constitution of the United States. Petitioner argued that

> "the jury pool in Puerto Rico illegally discriminates against the people with lower incomes, in violation of 28 U.S.C. § 1861 and the Sixth Amendment to the United States Constitution. This discrimination occurs as a result of excluding otherwise qualified jurors from the jury pool solely because they do not speak English."

Mem. in Support of Defendants' Pretrial Motions, at 32.

It was not disputed that the United States District Court in Puerto Rico excludes from juries all persons who do not read, write, speak and understand English. It was also undisputed that this exclusion removes from federal jury service the majority of the otherwise-eligible jurors in Puerto Rico. In support of his motion, petitioner submitted an uncontroverted expert affidavit which concluded that the "English language proficiency requirement established by the Puerto Rico Federal District Court, systematically biases the jury selection process towards the upper brackets of the income distribution," and "due to the socioeconomic characteristics of the predominantly Spanish speaking population of Puerto Rico, the English language requirement results in a jury selection process that systematically discriminates against the majority of the resident population of Puerto Rico." A. 62a, 64a.

The District Court denied the motion, holding that petitioner's objection was "foreclosed" by prior decisions of the First Circuit. A. 32a, adopted at A. 35a. It held:

> "Even if the statistical accounts proposed by movants are accurate, resulting in a smaller pool of eligible jurors and a systematic exclusion of Spanish-speaking/non-English speaking jurors in the jury selection process, the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District Court of Puerto Rico in English, as is traditionally done in federal courts, and requiring jurors to be proficient in that language."

A. 32a, adopted at A. 35a.

2. Citing *United States* v. *Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998), petitioner argued that because ACHS, Inc., was a private, for-profit business which contracted to supply specific services to a municipality and was paid from the municipality's general funds, it had not received "benefits . . . under a Federal program" of "Federal assistance" within the

meaning of 18 U.S.C. § 666(b).[3] Petitioner also requested that the jury be instructed, as to the meaning of "benefits" in § 666, that "not every payment by the federal government to an organization constitutes federal 'benefits' as required by the statute," and "[p]ayments made by the federal government to a private corporation as part of an ordinary commercial transaction do not qualify as federal benefits." A. 19a. The District Court rejected the request. Instead, the court simply recited to the jury the language of the statute, Tr. 3589, adding that "it is not required that the funds received from the federal government be the funds actually embezzled," Tr. 3593. It gave the jury no instruction as to any requirement of any connection between the acts complained of and the expenditure of federal funds, nor any instruction as to the meaning of "benefits" in the statute. The government argued to the jury that "federal funds never lose their federal character, even when a third party is the one who receives those funds." Tr. 3291.

The District Court held that ACHS, Inc., "was not in a purely commercial relationship with the federal government" because "the Municipality maintained administrative and

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[3] The record showed that (1) the National Institute on Drug Abuse had made a grant to the Department of Anti-Addiction Services of the Commonwealth of Puerto Rico for "AIDS Community Outreach and Counseling," J.A. 594; (2) the Commonwealth thereafter had executed a contract with the Municipality of San Juan, and paid the Municipality from general revenues of the Commonwealth, J.A. 589; finally, (3) the Municipality had contracted with ACHS, Inc., to provide services, J.A. 322. According to the government, Tr. 3290,

> "the municipality would receive federal funding. It would be deposited in the operating accounts, where federal funds stay in municipal—funds of the municipality would be mixed and commingled, and from that account checks would be made payable to the San Juan AIDS Institute and/or ACHS, where in turn they would be deposited at an operating account, where again all those funds would again be mixed."

supervisory roles over ACHS," and in any event "the contractual relationship itself is a form of a federal assistance." A. 52a. Petitioner was convicted of one count of conspiracy to violate 18 U.S.C. § 666.

B. Decision of the Court of Appeals.

1. On appeal to the United States Court of Appeals for the First Circuit, petitioner argued that "[b]y summarily rejecting all motions challenging the venire based on the exclusion of non-English speakers, the trial court denied defendants their rights under [28] U.S.C. § 1861 and the Sixth Amendment." Brief for Appellant Dubón Otero, Ct. Apps., at 62. The government responded:

> "This Court has repeatedly upheld application of the English-proficiency requirement in the District of Puerto Rico, even though the result is to exclude from qualification a significant portion of the population. See *United States* v. *Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995)(assuming that the practice 'excludes two-thirds of the population of Puerto Rico') . . . ."

Brief for United States, Ct. Apps., at 24.[4]

The Court of Appeals held the issue settled by its prior decisions. The Court of Appeals acknowledged this Court's holding in *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975), that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." But the Court of Appeals nevertheless affirmed, reasoning:

> "We previously held a similar challenge to be unavailing in *United States v. Benmuhar*, 658 F.2d 14 (1st Cir. 1981). Dubón and Garib seek to distinguish *Benmuhar*

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[4] Citing also *United States* v. *Aponte-Suarez*, 905 F.3d 483, 491-92 (1st Cir.), *cert. denied*, 498 U.S. 990, 1092 (1990); *United States* v. *Benmuhar*, 658 F.2d 14, 18-20 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982).

> as having been decided in part upon the absence of any viable alternative, while here they suggested simultaneous translation. However, we stated in *United States v. Flores-Rivera*, that it is 'the overwhelming national interest served by the use of English in a United States court,' which 'justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language.' 56 F.3d 319, 326 (1st Cir. 1995)(quoting *United States v. Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir. 1990))."

A. 27a-28a. The court added that "[t]his justification is independent of the presence or lack of any viable alternatives." A. 28a.

2. The Court of Appeals held that ACHS, Inc., was the recipient of "benefits . . . under a Federal program," 18 U.S.C. § 666(b), based solely on the two payments received by ACHS, Inc., in 1989 and 1990, A. 11a & n.9, even though ACHS, Inc., had simply provided specified services under a for-profit contract, and even though the statute specifically "does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c); A. 12a-13a. The Court of Appeals held that "even if we were to find error in the district court's failure to define 'federal program' and 'federal assistance' in its instructions, such error would be harmless." A. 20a n.18. It held that the Municipality's contractual payments to ACHS, Inc., for specified services constituted "benefits" "under a Federal program" involving "Federal assistance" no different from the payments by the federal government for hospitals under the Medicare program in *Fischer* v. *United States*, 529 U.S. 667 (2000). "We conclude that that if the payments in *Fischer* were 'made not simply to reimburse,' 529 U.S. at 679, then neither were the payments here." A. 14a. Rehearing and rehearing *en banc* were denied. A. 29a.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment, this Court has held, guarantees federal criminal defendants "a petit jury selected from a fair cross section of the community." *Duren* v. *Missouri*, 439 U.S. 357, 359 (1979). But in the community that comprises the federal district of Puerto Rico, not merely a significant portion, but the actual majority of its members, is excluded from criminal juries in federal court, simply because they do not speak English. Indeed, the First Circuit for many years has acknowledged that by systematic exclusion of non-English-speakers from juries, the United States District Court for the District of Puerto Rico "effectively excludes two-thirds of the population of Puerto Rico." *United States* v. *Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995). Moreover, that excluded majority includes a disproportionately large share of Puerto Ricans of lower income and less formal education. A. 62a, 64a.

Yet in spite of *Duren* and parallel decisions of this Court, the First Circuit—relying each time on a line of its own prior decisions dating from the 1940s—has continued year after year to hold that exclusion of the majority of Puerto Ricans from federal criminal juries on the basis of language does not violate the Sixth Amendment. The First Circuit has assumed that this massive exclusion is constitutionally supportable because by law proceedings in the federal district court in Puerto Rico are conducted in English. Yet in the present case, the First Circuit refused even to consider whether such exclusion is necessary, particularly in a district court where translations are routinely provided every day for the many witnesses who testify in Spanish, and for that court's many non-English-speaking defendants. Its holding, the First Circuit declared, is "independent of the presence or lack of any viable alternatives." A. 28a. Thus in the United States

District Court for the District of Puerto Rico, citizens who do not speak English are welcome as witnesses, as experts—very often as defendants—but never as jurors.

This holding cannot be reconciled with this Court's Sixth Amendment decisions in *Duren* v. *Missouri*, 439 U.S. 357 (1979), and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). The First Circuit is the only Court of Appeals that reviews criminal appeals from the District of Puerto Rico, which is the only majority-Spanish-speaking federal district in the United States. Hence only this Court can correct this continuing serious departure from this Court's decisions and the constitutional requirement.

The Court of Appeals also misconstrued this Court's decision in *Fischer* v. *United States*, 529 U.S. 667 (2000), and widened an existing conflict among the circuits, by holding that 18 U.S.C. § 666 can apply to misappropriation from a private contractor with a municipality, and further can constitutionally be applied without proof of any connection between the acts committed and any effect on a federal program.

I. SYSTEMATIC EXCLUSION OF THE NON-ENGLISH-SPEAKING MAJORITY OF PUERTO RICANS FROM FEDERAL CRIMINAL JURIES IN PUERTO RICO VIOLATES THE SIXTH AMENDMENT.

This Court repeatedly has held that the Sixth Amendment "right to . . . trial, by an impartial jury of the State and district" [5] includes the right to a jury selected from a fair cross

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[5] In addition to the Sixth Amendment, Article III, § 2, guarantees that in federal courts "The trial of all Crimes . . . shall be by Jury . . . ." The United States District Court for the District of Puerto Rico is a court established under Article III. See 28 U.S.C. §§ 119, 133, 134, 451.

section of the community. "[T]he very idea of a jury [is] 'a body truly representative of the community . . . .'" *Carter* v. *Jury Comm'n*, 396 U.S. 320, 330 (1970), quoting in part *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), this Court held:

> "The purpose of the jury is . . . to make available the commonsense judgment of the community . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. . . . *Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.*"

Id. at 530 (emphasis supplied). And in *Duren* v. *Missouri*, 439 U.S. 357, 370 (1979), this Court admonished:

> "[T]he constitutional guarantee to a jury drawn from a fair cross section of the community requires that States exercise proper caution in exempting broad categories of persons from jury service. . . . [A]ny category [of exclusion] expressly limited to a group in the community of sufficient magnitude and distinctiveness as to be within the fair-cross-section requirement—such as women—runs the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement."

The constitutional guarantee is implemented in 28 U.S.C. § 1861, which adopts as federal policy "that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." Further, 28 U.S.C. § 1862 provides that

> "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States

> . . . on account of race, color, religion, sex, national origin, or economic status."

As a nationwide matter, 28 U.S.C. § 1865 contemplates exclusion of otherwise-qualified jurors who do not speak English.[6]

A. This Court's Decisions Hold That the Sixth Amendment Forbids Jury Exclusion That Precludes a Fair Cross Section of the Community.

More than a century ago this Court held that the Fourteenth Amendment forbids systematic exclusion by state courts of racial or other identifiable segments of society. In *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880), this Court explained:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his

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[6] Title 28 U.S.C. § 1865(a) provides for jury selection plans that "shall determine . . . whether a person is unqualified for, or exempt, or to be excused from jury service," and further provides in § 1865(b) that such a plan

> "shall deem any person qualified to serve on grand and petit juries in the district court unless he—
>
> * * *
>
> "(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
>
> "(3) is unable to speak the English language."

See *Hernandez* v. *New York*, 500 U.S. 352, 371 (1991) (plurality op.). The jury selection plan of the United States District Court for the District of Puerto Rico requires that jurors must be able to "read, write, speak, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the Juror Qualification Form," and that "the Court will interview each person to ascertain his or her English proficiency." U.S. Dist. Court, D.P.R., Amended Jury Selection Plan, Sept. 1, 1996, at ¶¶ 6(a), 13B.

> neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

In *Smith* v. *Texas*, 311 U.S. 128, 130 (1940), this Court reiterated that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." See also *Hernandez* v. *Texas*, 347 U.S. 475 (1954) (invalidating systematic exclusion of persons of Mexican descent).

This Court applied the same fair-cross-section requirement to the federal courts under its supervisory power, holding in *Glasser* v. *United States*, 315 U.S. 60, 85 (1942), that "the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class." 315 U.S. at 86. In *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), and *Ballard* v. *United States*, 329 U.S. 187 (1946), this Court invalidated federal-jury qualifications that worked a class-based discrimination by excluding daily-wage-earners, or that excluded women. Then in 1975 this Court held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975).

B. Exclusion of the Non-English-Speaking Majority of Puerto Ricans Violates the Rule of *Duren* v. *Missouri*.

In *Duren* v. *Missouri*, 439 U.S. 357 (1979), this Court held that a jury-selection system that resulted in venires averaging less than 15% women violated a criminal defendant's "right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community." 439 U.S. at 359 (footnote omitted). In *Duren* this Court established a three-part test:

> "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1)

> that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process."

439 U.S. at 364. If such a *prima facie* case showing is made, then under *Duren* the exclusion is invalid unless "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-68 (footnote omitted).

1. Absence of a Fair Cross Section Because of Systematic Exclusion Is Undisputed.

It has been acknowledged for years that the exclusion of the non-English-speaking majority prevents federal juries in Puerto Rico from being representative of the community. Indeed, the government conceded in the present case that "the result is to exclude from qualification a significant portion of the population." Brief for United States, Ct. Apps., at 24. See, *e.g.*, *United States* v. *Flores-Rivera*, 56 F.3d at 326 ("excludes two-thirds of the population of Puerto Rico"). The exclusion, the undisputed record shows, A. 62a, 64a, and the First Circuit has long recognized, also has the effect of selecting jurors from a group disproportionately of highest socioeconomic status. As early as 1947 that court acknowledged that

> "although few wage earners are selected for federal jury service, the reason is that few in that class have sufficient knowledge of the English language to meet the statutory requirement for such service."

Quinones v. *United States*, 161 F.2d 79, 81 (1st Cir.), *cert. denied*, 331 U.S. 833 (1947).

The First Circuit has never questioned that by this exclusion, all three of the elements of the *Duren* test are present. *United States* v. *Benmuhar*, 658 F.2d 14, 19 (1st Cir. 1981), *cert. denied sub nom. Nieves* v. *United States*, 457 U.S. 1117 (1982).[7] (1) A distinctive group is excluded; (2) its representation—0%—in venires "is not fair and reasonable" in relation to its proportion in the society—over one-half to two thirds; and (3) the exclusion "does operate in a systematic manner." 658 F.2d at 19. Indeed, the disparity through exclusion of non-English-speakers in Puerto Rico (at least 52% to 75% of the relevant population,[8] 0% serving on juries) is wider than that from the exclusion of women that was invalidated in *Duren* (54% of the relevant population, 15% serving on juries). See 439 U.S. at 362.

2. *The First Circuit's Position Rests on Discarded Constitutional Doctrine.*

The First Circuit's holding adheres to a line of its decisions founded on reasoning long rejected by this Court, with roots in a wholly different constitutional era. In that court's seminal case, decided in 1947, the court perceived no problem that "few wage earners are selected for federal jury service," because "few in that class have sufficient knowledge of the English language." *Quinones* v. *United States*, 161 F.2d at 81. The court reasoned that similarly "there is no constitutional requirement that women be included among those called to serve on juries in the federal

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[7] The petition for certiorari to review *Benmuhar* did not raise the jury-exclusion issue. See Petition for Certiorari, *Nieves* v. *United States*, No. 81-1534, at i-ii (1981).

[8] The 1990 census, latest with such data available, listed 52.6% of Puerto Ricans over age 5 "unable to speak English" and another 23.8% who "speak English with difficulty." U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION, SOCIAL AND ECONOMIC CHARACTERISTICS, PUERTO RICO 923 (1993).

courts." 161 F.2d at 82. In 1958 it reaffirmed that exclusion of non-English-speaking jurors in Puerto Rico was

> "quite clearly reasonable and indeed necessary to the proper functioning of the court as a member of the federal judicial system. Certainly it is reasonable that a court conduct its proceedings in a single language and it is obviously essential that the judge, the counsel and all the jurors have a working knowledge of that language if the judicial machinery is to function efficiently."

Miranda v. *United States*, 255 F.2d 9, 16-17 (1st Cir. 1958).

Not surprisingly, after this Court decided *Duren* the First Circuit was asked to reexamine the issue. But the First Circuit refused to change. In *United States* v. *Benmuhar*, *supra*, it held that in spite of the *prima facie* constitutional violation, the Sixth Amendment requirement was overcome by "the government's interest" in "assuring that national courts are conducted in the national language." 658 F.2d at 19 (footnote omitted). The court's entire description of that governmental interest—referring to "symboli[sm]" and emphasizing convenience for non-resident attorneys, prosecutors and judges—was as follows:

> "Federal district courts in part are designed to provide trial alternatives for litigants, resident and nonresident, who seek the uniformity, expertise, and familiarity that they believe they may find in a national rather than a local forum. Primary use of the national language is both symbolically and functionally significant in achieving this goal. Non-resident citizens who do not speak Spanish may use the Puerto Rican federal district court without unusual requirements. The Attorney General of the United States may appear personally or by representative without being limited by considerations of fluency in Spanish. Other judges may sit by designation as needed without regard to their ability in

> Spanish. Possible translation distortions in indictments and complaints based on statutes written in English are avoided, as they are again during appellate review. *See generally United States v. Valentine*, 288 F. Supp. 957, 964-65 (D.P.R. 1968).
>
> "We consequently decide that the national language interest is significant."

Id. at 20. The court never addressed whether any practical arrangement could be made for Puerto Ricans who did not speak English to sit as jurors. It explained that "[w]e do not believe that the government has the burden under *Duren* . . . of demonstrating the unavailability or impracticality of alternative policy accommodations . . . ." *Id.* at 20 n.4.

Against repeated challenges, the First Circuit has adhered to its position in subsequent decisions, of which the present one is the latest. In 1990 it recognized "a systematic exclusion of a substantial portion of the Puerto Rican population from federal juries," and that "[w]e acknowledged this exclusion, but held that the requirement was constitutional because it served a significant state interest." *United States* v. *Aponte-Suarez*, 905 F.2d 483, 492 n.5 (1st Cir.), *cert. denied*, 498 U.S. 990, 1092 (1990).[9] In 1995 it held that "the 'English only' requirement of the jury selection system . . . effectively excludes two-thirds of the population of Puerto Rico," but "[t]his argument is foreclosed by our decision in *United States v. Aponte-Suarez* . . . ." *United States* v. *Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995). Three years ago it reiterated that "we decline to revisit the issue." *United States* v. *Escobar-De Jesus*, 187 F.3d 148, 166

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[9] The *pro se* and *in forma pauperis* petitions for certiorari in *Aponte-Suarez* did not raise the Sixth Amendment jury-exclusion issue. See Petition for Certiorari, *Aponte-Suarez* v. *United States*, No. 90-5989, at i (1990); Petition for Certiorari, *Perez-Morales* v. *United States*, No. 90-5959, at i (1990).

(1st Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000).[10] In the present case, it declined once again. A. 27a.

3. The Interest in Convenience Identified by the First Circuit Does Not Justify Massive Jury Exclusion.

The only reason offered for exclusion of the bulk of Puerto Ricans from criminal juries in their federal court is what the First Circuit calls "the overwhelming national interest served by the use of English in a United States court," which it says in turn "justifies . . . requiring jurors to be proficient in that language." A. 28a, quoting *United States* v. *Aponte-Suarez*, 905 F.2d at 492.

That asserted justification will not stand up. First, even if the need to conduct proceedings in English were assumed, it still would not follow that exclusion of the majority of Puerto Ricans from federal juries is essential to that end.[11] Simultaneous translation routinely occurs on a daily basis in the United States District Court in Puerto Rico—a court in which a staff of English-Spanish translators is "always . . . at the service of the Court," U.S. District Court, D.P.R., General

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[10] The *in forma pauperis* petition for certiorari in *Escobar-De Jesus* stated without referring to any authority that exclusion of "two-thirds of the population of any jurisdiction from jury service raises serious constitutional issues." Petition for Certiorari, *Escobar De Jesus* v. *United States*, No. 99-7685, at 24 (1999). Apart from that, insofar as can be determined, review of this Sixth Amendment issue by this Court has not been sought since 1947. See Petition for Certiorari, *Quinones Jimenez* v. *United States*, No. 1251 OT 1946, at 5 (1947).

[11] The Jones Act, Act of March 2, 1917, ch. 145, § 42, 39 Stat. 951, 966, as amended, 48 U.S.C. § 864, provides that "All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." It carries forward an identical requirement in the Foraker Act of 1900, enacted after Puerto Rico was acquired from Spain. Act of April 12, 1900, ch. 191, § 34, 31 Stat. 77, 85.

Rule 108(2), and courtrooms are equipped with electronic headsets to provide simultaneous translation for any and all persons needing it. Simultaneous translation is available not only for Spanish-speaking witnesses, but during the entire trial for most criminal defendants—about 80% of whom do not speak English.[12]

In a previous case the First Circuit had commented that "[a]s the record now stands . . . there is absolutely no discussion of the feasibility of administrative or technological options that could satisfy the government's interest without imposing the English proficiency requirement upon jurors." *United States* v. *Benmuhar*, 658 F.2d at 20 n.4. But if that observation hinted that the door to methods other than exclusion was open a crack, the present decision has slammed it shut. The First Circuit now has flatly refused even to consider what practical steps could be taken so that Spanish-speaking jurors could effectively serve:

> "Dubón and Garib seek to distinguish *Benmuhar* as having been decided in part upon the absence of any viable alternative, while here they suggested simultaneous translation. However, we stated in *United States v. Flores-Rivera*, that it is 'the overwhelming national interest served by the use of English in a United States court' which 'justifies conducting proceedings in

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[12] Statement of Secretary of Justice of Puerto Rico, Hearings on S. 1724 Before Subcomm. on Improvements in Judicial Machinery, U.S. Senate, 93d Cong., 2d Sess. 155 (1974). All federal criminal defendants are entitled to translation if they do not understand English. *E.g.*, *United States* v. *Lim*, 794 F.2d 469, 471 (9th Cir.), *cert. denied*, 479 U.S. 937 (1986); *United States ex rel. Negron* v. *New York*, 434 F.2d 386, 389 (2d Cir. 1970); see 28 U.S.C. § 1827(d)(1). District judges in criminal cases may appoint interpreters, Fed. R. Crim. P. 28, who are available under the Court Interpreters Act, 28 U.S.C. § 1827. In Fiscal Year 2001, United States district courts used interpreters on 181,303 occasions, 94.5% of them for Spanish. ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT, 2001, at 14.

> the District of Puerto Rico in English and requiring jurors to be proficient in that language.' . . . *This justification is independent of the presence or lack of any viable alternatives.*"

A. 27a-28a (emphasis supplied).

Deaf jurors are not automatically disqualified from federal jury service, even though they require an interpreter. *United States* v. *Dempsey*, 830 F.2d 1084, 1088 (10th Cir. 1987); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 404 (W.D. Pa. 1989)(deaf juror with interpreter "would neither disrupt nor delay the judicial process in any respect"); *cf. Galloway* v. *Superior Court*, 816 F. Supp. 12, 17 (D.D.C. 1993)(federal law violated by exclusion of deaf or blind jurors).[13] No reason is apparent why jurors whose disability is linguistic could not similarly be provided simultaneous translations—if and when needed, given the reality that in the Puerto Rico federal court most witnesses testify in Spanish, which virtually all jurors in Puerto Rico perfectly comprehend.[14]

Second, it is not at all self-evident that use of English in that court (unlike all the other courts in Puerto Rico) serves an "overwhelming national interest" of constitutional magnitude. Earlier this year the First Circuit acknowledged: "we recognize that most jurors, and even judges, in Puerto Rico may be more comfortable speaking in Spanish than in English . . . ." *United States* v. *Rivera-Rosario*, 300 F.3d 1, 20 (1st Cir. 2002). Spanish is spoken by more than 98% of Puerto Ricans,[15] and Puerto Rico is "the sole district within

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[13] New Mexico courts as a matter of state constitutional law are required to provide interpreters for non-English-speaking jurors. See *State* v. *Rico*, 52 P.3d 942, 946 (N.M. 2002).

[14] See note 16, *infra*.

[15] U.S. DEPARTMENT OF COMMERCE, *supra*, at 923. The Supreme Court of Puerto Rico has declared:

the American federal judiciary where every judge and almost every juror is fluent in English *and Spanish*." *Rivera-Rosario*, 300 F.3d at 4 (emphasis supplied). In the present case, for example, 25 of 33 witnesses testified in Spanish, with their testimony translated to English by interpreters; most of the documents in evidence were in Spanish, and translated to English, with both versions provided to the jury. Defendants in the District of Puerto Rico appearing *pro se* have even been allowed to make their opening and closing arguments in Spanish to the jury. See *United States* v. *Ojeda-Rios*, 714 F. Supp. 600, 601 (D.P.R. 1989).[16]

The First Circuit has declared that "the use of English is necessary for the creation of an appellate record which will be read by appellate judges who may not be versant in other languages, and who do not have the benefit of an official translator as is available in district courts." *United States* v. *Gonzalez-Maldonado*, 115 F.3d 9, 18 n.3 (1st Cir. 1997). But

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> "It is a fact not subject to historical rectification that the vehicle of expression, the language of the Puerto Rican people—integral part of our language and of our hispanic culture—has been and continues to be Spanish. . . . [T]he means of expression of our people is Spanish, and that is a reality that cannot be changed by any law."

People v. *Superior Court*, 92 P.R.R. 580, 588-89 (1965) (footnote omitted). All the other courts in Puerto Rico draw criminal-trial juries from the entire electorate, conduct their proceedings in Spanish, and require facility in Spanish, which more than 98% of the population speaks. See Reglas de Procedimiento Criminal, Puerto Rico, Regla 96; U.S. DEPARTMENT OF COMMERCE, *supra*.

[16] It has been observed that "[u]se of English there is at times absurd, as when attorneys, parties, jurors and the judge are all native Spanish speakers, and yet all is translated back and forth between English and Spanish for no other reason than to comply with a statutory mandate, for no one pays any attention to the English translations." Luis Muniz Arguelles, *The Status of Languages in Puerto Rico*, in CARMELO DELGADO CINTRON, EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO 69, 79 (1994).

translation of the portions of records used in cases that are appealed is not an insuperable difficulty. Seldom is more than a small portion of a record required for an appeal. For many years, for example, this Court has reviewed decisions of the Supreme Court of Puerto Rico under 28 U.S.C. § 1258, even though that court's decisions are rendered in Spanish, with records also in the Spanish language. The records are simply translated insofar as is necessary.[17] The First Circuit itself reviews translated records in appeals from decisions of the district court reviewing courts of Puerto Rico in proceedings under 28 U.S.C. § 2254.[18] Whatever the convenience of the policy, a jury drawn from a fair cross section is a constitutional command; exclusion of the majority of the population from juries is not.

Among various potential accommodations, the First Circuit has selected the one that destroys the Sixth Amendment right—automatic exclusion of a large majority of the population of Puerto Rico from federal-court juries. Protestations of beneficent intentions in jury exclusion cannot justify departure from a constitutional guarantee.

> "[T]he officials charged with choosing federal jurors . . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. . . . That the motives influencing such tendencies may be of the best must not blind us to the

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[17] See, *e.g.*, joint appendices filed in *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986); *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1 (1982); *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979); see also *El Vocero de Puerto Rico* v. *Puerto Rico*, 508 U.S. 147 (1993)(decision on petition for certiorari with translated appendix).

[18] *E.g.*, *Cruz-Sanchez* v. *Rivera-Cordero*, 835 F.2d 947 (1st Cir. 1987); *Velez* v. *Schmer*, 724 F.2d 249 (1st Cir. 1984); see also *Rivera* v. *Concepcion*, 355 F. Supp. 662, 668 (D.P.R. 1972)(appending translations from record of Puerto Rico courts).

> dangers of allowing any encroachment whatsoever on this essential right."

Glasser v. *United States*, 315 U.S. at 86; *accord*, *Hernandez* v. *Texas*, 347 U.S. at 481-82; *Norris* v. *Alabama*, 294 U.S. 587, 598 (1935). "For a jury to perform its intended function as a check on official power, it must be a body drawn from the community." *Batson* v. *Kentucky*, 476 U.S. 79, 87 n.8 (1986). "The right to a proper jury cannot be overcome on merely rational grounds." *Taylor* v. *Louisiana*, 419 U.S. at 534; *Duren* v. *Missouri*, 439 U.S. at 367.

C. Certiorari to the First Circuit Is Appropriate.

Puerto Rico is the only federal district in the United States in which the majority of the population is non-English-speaking.[19] The First Circuit is the only United States Court of Appeals that reviews criminal appeals from the United States District Court for the District of Puerto Rico. 28 U.S.C. §§ 41, 1294(1). Hence no other court of appeals has occasion to address this important federal constitutional issue, arising in a single district, but deeply affecting the administration of justice in an Article III court.

This Court regularly has reviewed decisions of the First Circuit on federal issues concerning Puerto Rico. See, *e.g.*, *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 (1970)(observing that "[t]he relations of the federal courts to Puerto Rico have often raised delicate problems"); *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983). Similarly, this Court reviews important decisions of appellate courts with exclusive jurisdiction of a particular category of cases not shared with other courts. *E.g.*, *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370 (1996) (Federal Circuit—patents); *United States* v. *Winstar*

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[19] That court's jury selection plan notes that "Our district has the unique situation where English is not the primary language spoken . . . ." Amended Jury Selection Plan, n. 6, *supra*, ¶ 13B.

Corp., 518 U.S. 839 (1996) (Federal Circuit—government contracts); *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988)(Temporary Emergency Court of Appeals). Because only one court of appeals faces the permanent exclusion of a non-English-speaking majority from federal criminal juries, and because that court of appeals repeatedly has not followed this Court's Sixth Amendment decisions, certiorari is appropriate.

II. THE FIRST CIRCUIT'S INTERPRETATION OF 18 U.S.C. § 666 CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. In Holding § 666 Applicable to Misappropriation From a Private Contractor Far Removed From a Federal Grant, the Decision Conflicts With Those of the Eleventh Circuit and With *Fischer* v. *United States*.

In *United States* v. *Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998), the Eleventh Circuit held with respect to 18 U.S.C. § 666 that "the statute clearly indicates that only those contractual relationships constituting some form of 'Federal assistance' fall within the scope of the statute. . . . Thus, organizations engaged in purely commercial transactions with the federal government are not subject to § 666." *Id.* It reaffirmed that holding in *United States* v. *Fischer*, 168 F.3d 1273, 1276-77 (11th Cir. 1999), *aff'd on another point*, 529 U.S. 667 (2000). *Accord*, *United States* v. *Stewart*, 727 F. Supp. 1068, 1072-73 (N.D. Tex. 1989).

In *Fischer* v. *United States*, 529 U.S. 667 (2000), this Court for the first time considered the meaning of "benefits" under § 666.[20] This Court explained that there must be

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[20] The issue of what constitutes "benefits" had not been addressed by this Court in *Salinas* v. *United States*, 522 U.S. 52 (1997). See *id.* at 54-

careful examination of the nature of funding and the particular program involved, and admonished that

> "Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance."

529 U.S. at 681. This Court specifically declined to "endors[e] the Government's broader position" that § 666 requires no more than that funds "can be traced from federal coffers." *Id.* at 677. Here, moreover, the payments to ACHS, Inc., were three tiers removed from a federal grant, after which the funds were, in the government's own description, "mixed and commingled" with others. Tr. 3290; n.3, *supra*.

The Court of Appeals saw a contract to provide services to a municipality as "Federal assistance" no different from the Medicare program in *Fischer*. A. 14a. But the two are not identical at all. In its *Fischer* opinion, this Court took four pages to detail complex provisions of the federal Medicare program, a program which makes federal payments of many kinds to participating hospitals choosing to participate in the program, subject to dozens of federal requirements. 529 U.S. at 671-75. Thus as conditions of participation, hospitals had to satisfy federal statutory and regulatory licensing standards. 529 U.S. at 672. They had to organize themselves internally as prescribed by federal requirements, to maintain a detailed variety of services in particular ways and during specified hours, and to submit to specified monitoring. *Id.* The amounts received were variable and came directly from the federal government, based on what the federal government directed as a reasonable reimbursement. *Id.* at 673. Pay-

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55 ("[w]e denied certiorari on the question whether the moneys paid to the county were 'benefits' under a 'Federal program' under § 666(b) . . . .").

ments were based not only on costs of services, but also added amounts for "developing and maintaining the operation of patient care facilities and activities," *id.*, including facilities used by patients not covered by Medicare, *id.* Federal payments also included sums for depreciation, and for maintenance of a specified staff. *Id.* at 674. Extra payments were authorized if the number of patients declined, with "subsidies . . . to continue as going concerns." *Id.* There were pay-ments "to protect providers' liquidity." *Id.* (internal quotation marks omitted).

This Court concluded that "the Medicare payments here in question" were not "for the limited purposes of compensating providers or reimbursing them for ordinary course expenditures." *Id.* at 679. "[T]he Government does not make the payment unless the hospital complies with its intricate regulatory scheme," and the payments "are made not simply to reimburse . . . but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community." *Id.* at 679-80. This Court in *Fischer* concluded its analysis of the intricate Medicare regime by admonishing that in applying § 666, "[t]he nature of the program bears on the question of statutory coverage." *Id.* at 675. To determine whether an organization receives "benefits" under § 666, "an examination must be undertaken of the program's structure, operation and purpose." *Id.* at 681.

Yet, brushing aside any such examination, the Court of Appeals assumed that *Fischer* also settled that § 666 should apply to a private for-profit corporation providing services under a contract with a municipality three tiers removed from a federal grant—a grant not authorized to benefit a for-profit entity, which ACHS, Inc., was at the time. See 21 U.S.C. § 1177(a). "[I]f the payments in *Fischer* 'were not made simply to reimburse,'" the Court of Appeals assumed, "then neither were the payments here." A. 14a, quoting in part 529

U.S. at 679. The Court of Appeals specifically approved the holding of the District Court that § 666 applied because "the contractual relationship itself is a form of federal assistance." A. 22a n.20.

B. In Failing To Require Effect on a Federal Program Interest, the Decision Conflicts With Those of the Second and Third Circuits.

In *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2102 (2002), this Court earlier this year explained:

> "When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires . . . ."

But here there was never any evidence, or even any claim—even assuming that the funds in question could be attributed to an ultimate federal source—that the acts complained of caused ACHS, Inc., to injure any federal program or to fail to provide satisfactorily everything that was called for by its agreement with the Municipality of San Juan. Nor was there any suggestion that ACHS, Inc., was restricted in any way as to how it was to spend any profits or revenues it received.

The government already has informed this Court that the circuits are split as to whether § 666 requires proof that the conduct complained of affected some federal program interest:

> "There is currently a divergence of views among the circuits on whether Section 666 requires the government to prove a connection between the defendant's criminal acts and some federal programmatic interest (including, but not necessarily limited to, the integrity of federal funds). After this Court's decision in *Salinas*, the Sixth Circuit reaffirmed its conclusion that Section 666 does not require a nexus between bribes and the federal funding received by an organization. *United States* v. *Dakota*, 197 F.3d 821, 826 (1999). The Seventh Circuit

> likewise rejected an argument that a bribery conviction under Section 666 is not proper unless the program or activity that was touched by the bribery itself received federal funds. See *United States* v. *Grossi*, 143 F.3d 348 (1998), cert. denied, 525 U.S. 879 (1998). On the other hand, the Second Circuit has reaffirmed, albeit in dicta, its position that Section 666 requires the government to show some connection between the prohibited act and a federally funded program (although the government need not show that the funds themselves were impaired). *United States* v. *Santopietro*, 166 F.3d 88, 92-94 (1999). The Third Circuit has held that 'Section 666 requires that the government prove a federal interest is implicated by the defendant's offense conduct.' *United States* v. *Zwick*, 199 F.3d 672, 687 (1999)." [21]

In the months since that submission, the split has deepened. The Second and Third Circuits continue to hold that such a nexus to a federal program interest is required. *United States* v. *Santopietro*, 166 F.3d 88, 92-94 (2d Cir. 1999); *United States* v. *DeLaurentis*, 230 F.3d 659, 661-62 (3d Cir. 2000); *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999). The Sixth and Seventh Circuits continue to hold the opposite, and have been joined by the Eleventh. *United States* v. *Suarez*, 263 F.3d 468, 489 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1547 (2002); *United States* v. *Fernandez*, 292 F.3d 500, 510-11 (7th Cir.), *pet'n for cert. filed*, No. 02-209 (2002); *United States* v. *Edgar*, ___ F.3d ___, 2002 WL 31028287 at *8 (11th Cir. 2002). The Fifth and Eighth Circuits have followed those decisions, but are internally split. See *United States* v. *Lipscomb*, 299 F.3d 303, 305 (5th Cir. 2002) ("questions that have divided our panel three ways"); *United States* v. *Morgan*, 230 F.3d 1067, 1071 (8th Cir. 2000)(Bye,

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[21] Brief for United States in Opposition, *Suarez* v. *United States*, No. 01-7509, at 9-10 (2002)(footnote omitted). The Government argued that *Suarez* was "not an appropriate vehicle for resolving that disagreement." *Id.* at 10. Certiorari was denied. 122 S. Ct. 1547 (2002).

J., concurring), *cert. denied*, 122 S. Ct. 62 (2001). See also *United States* v. *Lipscomb*, 299 F.3d at 329 (5th Cir. 2002) ("four of our fellow appellate courts have examined the sweep of § 666, either as a statutory matter or a constitutional one, and are also divided"); *United States* v. *Wright*, 206 F. Supp. 2d 609, 622 n.8 (D. Del. 2002) ("a circuit split has developed among the appeals courts"). The issue is already before the Court in at least one pending petition. Petition for Certiorari, *Fernandez* v. *United States*, No. 02-209, at i. In that case the government has again acknowledged that "[i]n the wake of *Salinas*, the courts of appeals have taken divergent approaches on the reach of Section 666." [22]

Petitioner also argued that because the District Court refused to instruct the jury as to the meaning of Federal "benefits" or "Federal assistance"—an omission the Court of Appeals held to be at most "harmless error"—§ 666 was unconstitutional as applied to him. Some courts and judges have gone further, and concluded that § 666 as a criminal statute is unconstitutional in any application, as exceeding Congress' authority under the Spending Clause, Art. I, § 8, cl. 1. *United States* v. *Sabri*, 183 F. Supp. 2d 1145 (D. Minn. 2002), *appeal pending*, No. 02-1561 (8th Cir.); *accord*, *United States* v. *Morgan*, 230 F.3d 1071-75 (Bye, J., concurring). *Cf. Fischer*, 529 U.S. at 690 n.3 (Thomas, J., dissenting)("Arguably, if Congress attempted to criminalize acts of theft or bribery based solely on the fact that—in circumstances unrelated to the theft or bribery—the victim organization received federal funds as payment for a market transaction, this constitutional requirement would not be satisfied."). As interpreted by the First Circuit, § 666 would

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[22] Brief for United States in Opposition, *Fernandez* v. *United States*, No. 02-209, at 6 (2002) (ms. version). In *Fernandez* the government once again has argued that "[t]his case is not an appropriate vehicle for resolving the divergence among the circuits on the reach of Section 666 . . . ." *Id.* at 7.

misapply the spending power just as this Court held the commerce power had been misapplied in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000); *cf. United States* v. *Bass*, 404 U.S. 336, 349-50 (1971). See also this Court's decisions recognizing limits on the spending power in civil legislation. *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999); *United States Dep't of Transp. v. Paralyzed Veterans*, 477 U.S. 597 (1986).

CONCLUSION

For the reasons stated, certiorari should be granted.[23]

Respectfully submitted,

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October 18, 2002

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[23] Pettioner adopts also the arguments of petitioner in *Garib Bazain v. United States*, seeking review of the same judgment.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2029

UNITED STATES,

Appellee,

v.

LUIS E. DUBÓN-OTERO,

Defendant-Appellant.

No. 00-2030

UNITED STATES,

Appellee,

v.

JORGE L. GARIB-BAZAIN,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. José Antonio Fusté, *U.S. District Judge*]

Before Selya, *Circuit Judge*, John R. Gibson,* *Senior Circuit Judge*, and Lipez, *Circuit Judge*.

David W. Roman, with whom *Brown & Ubarri, Frederick P. Hafetz, Susan R. Necheles, Elizabeth M. Johnson*, and *Goldman & Hafetz* were on brief, for appellant Dubón.

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* Of the Eighth Circuit, sitting by designation.

Scott A. Srebnick, with whom *Howard M. Srebnick* and *Black, Srebnick, & Kornspan* were on brief, for appellant Garib.

Richard A. Friedman, United States Department of Justice, with whom *Guillermo Gil*, United States Attoeney, and *Maria Dominguez and Thomas F. Klumper*, Assistant United States Attorneys, were on brief, for appellee.

May 29, 2002

JOHN R. GIBSON, *Senior Circuit Judge*. Luis Dubón-Otero and Jorge L. Garib-Bazain appeal from their convictions, after a joint trial, for conspiring to steal property worth more than $5,000 from an organization receiving more than $10,000 in federal benefits in any one-year period. *See* 18 U.S.C. §§ 371, 666(a)(1)(A) and (2) (1994). They argue that there was a constructive amendment of the indictment, that there was insufficient evidence to convict them, and that the jury instructions were defective. They also challenge the makeup of their jury and the appointment of the United States Attorney. Garib also appeals his conviction for making false declarations before a grand jury in violation of 18 U.S.C. § 1623 (1994). We affirm.

Advanced Community Health Services (Health Services) was incorporated in the Commonwealth of Puerto Rico in 1987 as a for-profit corporation.[1] Dubón, a lawyer, and Garib, a doctor, were shareholders and directors. Dubón served as legal advisor to Health Services and Garib as the Medical Director of Patient Services. Dr. Yamil Kourí-Perez was a consultant from the Harvard Institute for International Development who, together with Jeanette Sotomayor-Vazquez, the

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[1] Health Services later became a non-profit corporation.

administrative director, and Angel Luis Corcino-Mauras, the comptroller, conducted the day-to-day operations of Health Services.

Dubón and Garib were charged with conspiring to use Health Services funds to pay personal expenses and make political payoffs. The principal witness at trial was Corcino, whose testimony painted a picture of Kourí as the primary conspirator. Kourí and Sotomayor were indicted along with Dubón and Garib, but tried separately. They were convicted, and we affirmed in *United States v. Sotomayor-Vazquez*, 249 F.3d 1 (1st Cir. 2001).

In January 1988, Health Services contracted with the Municipality of San Juan to provide services for AIDS patients. The initial contract provided that the Municipality would pay Health Services a flat fee of $3.2 million per year for these services. Because under the contract Health Services became "the exclusive source of AIDS counseling and professional services in San Juan," *United States v. Dubón-Otero*, No. 97-091, slip op. at 10 (D. P.R. March 3, 2000), federal monies began to find their way to Health Services.

The Government introduced evidence regarding the payment of these federal monies to Health Services, and the ways in which Dubón and Garib diverted these funds. This evidence will be discussed in greater detail below, as we discuss the various arguments made by Dubón and Garib on appeal.

I.

Dubón and Garib argue that the district court erred by allowing a constructive amendment of the indictment. Specifically, they complain the court admitted evidence that the funds the defendants had stolen were federal or public funds, which may have been entrusted to Health Services but never lost their federal or public character. Appellants argue admission of this evidence constituted a constructive amendment of the indictment. They construe the indictment as

limiting the charge against them to conspiring to steal only Health Services funds.

> A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them. An amendment of the indictment is considered prejudicial per se and grounds for reversal of a conviction whether it is brought about by a literal alteration of the words of the indictment, a jury instruction which modifies the offense charged in the indictment, or the admission of evidence of an offense not charged by the grand jury.

United States v. Dunn, 758 F.2d 30, 35 (1st Cir. 1985) (internal quotation marks and citations omitted).[2]

The charging paragraph of the indictment alleged that Dubón and Garib, "as agents of an organization which received benefits in excess of $10,000.00 under a Federal program involving a grant, or other form of Federal assistance," conspired with others to "embezzle, steal, and obtain by fraud, and without authority knowingly convert to the use of a person not the rightful owner, and intentionally misapply property worth at least $5,000.00 owned by such organization, that is, monies in excess of $2,000,000.00 in *program funds*." (Emphasis added.) (Paragraph Thirty-Seven of the indictment read: "the defendants embezzled, stole and obtained by fraud, in excess of $2,000,000.00 of *public funds*." (Emphasis added.)) The indictment incorporated Counts Two through Thirty-Four as overt acts, which further

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[2] Because our ultimate conclusion is that there was no constructive amendment in this case, we need not address the Government's argument that the rule of per se reversal of cases where there has been a constructive amendment has been modified by the Supreme Court's recent decision in *Neder v. United States*, 527 U.S. 1 (1999) (holding that failure to instruct jury on element of crime is subject to harmless error review).

described the funds in question as "owned by or *under the care, custody, and control* of [Health Services]." (Emphasis added.). Under Count I, the indictment charged Dubón and Garib generally with conspiracy to violate § 666. Section 666 seeks, among other things, to punish any agent of an organization receiving more than $10,000 in federal benefits in any one-year period, who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies property that—(i) is valued at $5,000 or more, and (ii) is owned by, *or is under the care, custody, or control* of such organization." 18 U.S.C. § 666(a)(1)(A) (emphasis added).[3] While the elements of the charged crime

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[3] The statute provides in relevant part:

> (a) Whoever, if the circumstances described in subsection (b) of this section exists—
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> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or agency thereof—
>
> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
>
> (i) is valued at $5,000 or more, and
>
> (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency;
>
> . . .
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.
>
> (c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

have to "appear primarily from the language in the indictment . . . common sense suggests that such a citation should not be entirely ignored where, as here, it so plainly reinforces what is implicit in the text." *United States v. McLennan*, 672 F.2d 239, 243-44 (1st Cir. 1982).

Dubón and Garib cite *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), for the proposition that overt acts cannot supply an element missing from the charging paragraph. *See id.* at 361 ("[A] conspiracy indictment's specification of overt acts cannot be used to supply the allegation of a critical element completely missing from the charging language."). However, *Pheaster* itself recognized that "reference to the overt acts is appropriate to confirm an otherwise common-sense interpretation of an allegation which is included in the charging language," *id.* at 362, and thus is of no help to Appellants.

A primary objective of the rule against constructive amendment of indictments is to ensure defendants have notice of the charges they must defend against. *United States v. Kelly*, 722 F.2d 873, 876 (1st Cir. 1983); *cf. United States v. Delano*, 55 F.3d 720, 729 (2d Cir. 1995) ("[W]e have consistently permitted significant flexibility in proof, provided that the defendant was given notice . . . ."). The indictment here put Appellants on notice that they would have to defend against exactly the type of evidence of entrustment of which they now complain. If Dubón and Garib chose not to defend

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(d) As used in this section--

. . .

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 666.

against that type of evidence, that choice does not make the district court's permitting the Government to go forward with such evidence a constructive amendment.

II.

The indictment in this case charged a conspiracy covering the years 1989 to 1994. Dubón and Garib argue the district court erred by refusing to acquit them following trial because the Government failed to prove Health Services received any federal benefits before 1991. They contend that amounts received in 1989 were commercial payments, not federal benefits, and thus their convictions could not be predicated on pre-1991 conduct.[4] Since there would be no way of assuring the jury did not rely on pre-1991 conduct in reaching its conclusion, the conviction could then not stand. *See Yates v. United States*, 354 U.S. 298, 312 (1957) ("[W]e think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected."). The Government, on the other hand, argues it proved Health Services received federal benefits beginning in January 1989. In the alternative, the Government argues the Supreme Court's decision in *Neder v. United States*, 527 U.S. ! (1999), modified *Yates* to allow harmless error review, and the error here was indeed harmless.[5]

We review a denial of a Rule 29 motion for acquittal de novo. *United States v. Czubinski*, 106 F.3d 1069, 1073 (1st Cir. 1997). We also review de novo the question of what type of transactions constitute benefits under § 666. *See United States v. Peery*, 977 F.2d 1230, 1233 n.2 (8th Cir. 1992) ("[D]etermining whether section 666 applies to Peery's

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[4] As we explain below, federal monies are not synonymous with federal benefits for purposes of a conviction under § 666.

[5] As in Part I above, our ultimate conclusion here precludes our having to address the Government's alternative *Neder* argument.

conduct is a question of law."). Finally, we review de novo the question of whether the Government presented sufficient evidence at trial to prove Health Services in fact received benefits under § 666, viewing the evidence in the light most favorable to the Government. *See United States v. Otero-Mendez*, 273 F.3d 46, 50 (1st Cir. 2001); *United States v. Fischer*, 168 F.3d 1273, 1276 n.7 (11th Cir. 1999), *aff'd Fischer v. United States*, 529 U.S. 667 (2000); *United States v. Copeland*, 143 F.3d 1439, 1442 (11th Cir. 1998).

Appellants concede Health Services received federal benefits beginning in 1991. The question we must answer is whether Health Services' receipt of federal monies between 1989 and 1991 constituted receipt of federal benefits. Three distinct transactions are at issue. First, on January 13, 1989, Health Services deposited two checks totaling $11,862.14 from the Centers for Disease Control, a federal agency. The Centers for Disease Control had contracted with the Municipality to test members of the public for AIDS, and the Municipality subcontracted the work to Health Services. Health Services was paid directly by the Centers for Disease Control. There was evidence Health Services received another $11,124.03 from the Centers for Disease Control in August 1989 for similar work. Second, Health Services received $70,680 in 1989, and $99,729 in 1990, to operate an assessment and intervention center for drug addicts. This money came from the Municipality. The Municipality in turn had received it from the Commonwealth, which had received it as a grant from the National Institute on Drug Abuse (the Institute), a federal agency. Third, on January 10, 1989, Health Services received $100,000 for work on a mass-media education project on AIDS. Although this money was paid by the Municipality, there was testimony from a municipal official that this payment had its source in federal funds, which passed through the Puerto Rico Department of Health to the Municipality.

The Supreme Court recently addressed the issue of what constitutes receipt of benefits under § 666 in *Fischer v. United States*, 529 U.S. 667 (2000).[6] In that case, the Court concluded that § 666 "covers fraud perpetrated on organizations participating in the Medicare program." *Id.* at 669. The Court reached this conclusion because the "nature and purposes of the Medicare program," *id.* at 671, indicated payments were made "for significant and substantial reasons in addition to compensation or reimbursement," such as assisting "the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community," *id.* at 679-80. The Court stated that the term "benefits" is used in the statute in its ordinary sense, *id.* at 677, and since the hospitals themselves derive significant advantage from participating in Medicare, they could be said to be deriving benefits within the meaning of § 666, "a statute we have described as 'expansive,' 'both as to the [conduct] forbidden and the activities covered,'" *id.* at 678 (quoting *Salinas v. United States*, 522 U.S. 52, 56 (1997)). The Court saw this conclusion as consistent with the language of the statute, which "indicates that Congress viewed many federal assistance programs as providing benefits to participating organizations," as well as "Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs." *Id.* at 678. The Court set out the following test:

> To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure,

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[6] *Fischer* was decided after the convictions in this case. Nonetheless, it applies on direct appeal. *See United States v. Ochs*, 842 F.2d 515, 519 (1st Cir. 1988) ("[I]n our direct review of the convictions entered below, we are bound by *McNally* [*v. United States*, 483 U.S. 350 (1987)], even though it was decided after the completion of proceedings in the district court.").

> operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program.

Id. at 681.

The Court rejected the notion that Medicare payments made to the hospitals were compensation of the type excluded by § 666(c).[7] In addition to the fact that monies paid included sums to enhance the hospitals themselves, Medicare placed conditions on recipient hospitals, "unlike the case of a contractor whom the Government does not regulate or assist for long-term objectives or for significant purposes beyond performance of an immediate transaction." *Id.* at 680.[8] The

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[7] Subsection (c) states: "This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business."

[8] A number of cases from other circuits, which preceded Fischer, also support the proposition that, while purely commercial payments made by the government "as a commercial entity, such as payments for supplies or equipment," do not constitute benefits under § 666, the mere presence of quid pro quo does not preclude a finding of federal benefits. *United States v. Rooney*, 986 F.2d 31, 33-34 (2d Cir. 1993) (holding that loan proceeds received from the Farmers Home Administration constituted benefits); *see United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) (holding that money paid to Lockheed Aeronautical Systems Company as the prime contractor for the Department of Defense did not constitute benefits under § 666); *United States v. Marmolejo*, 89 F.3d 1185, 1189-91 (5th Cir. 1996) (holding that funds provided to a county jail, in exchange for the jail housing federal prisoners, constituted benefits), *aff'd sub nom. Salinas v. United States*, 522 U.S. 52 (1997). Those cases distinguish purely commercial transactions from "monies distributed through 'Federal programs,' for which there is 'a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives.'" *Rooney*, 986 F.2d at 35 (quoting S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510); *see Copeland*, 143 F.3d at 1441-42; *Marmolejo*, 89 F.3d at 1190.

Court also rejected the contention that since the primary beneficiary of Medicare was the individual patient, the hospitals could not also be said to have received a benefit under the program. *Id.* at 677. Finally, the Court refused to endorse the notion that all that was required for funds to constitute benefits under § 666 was to establish that they came from a federal program. *Id.*

When we apply *Fischer* to this case, we conclude, and the jury supportably could have so found, that the Institute payments that Health Services received constituted benefits.[9] The Institute [10] monies in this case were originally disbursed under a grant to the Puerto Rico Department of Anti-Addiction Services. Anti-Addiction Services in turn made a grant of a portion of these funds to the Municipality, which then paid Health Services. Dubón acknowledges this money was "clearly a grant intended to assist AIDS patients in Puerto Rico," and "may also have been intended to assist the Commonwealth or the Municipality in that it enabled these government entities to assist citizens with drug addictions." Dubón questions, however, "whether the program under which this money was paid was intended to aid or promote the well being of [*Health Services*]." We point out that the Supreme Court in *Fischer* only said that "[t]he answer [to the question of whether there are federal benefits under § 666] *could* depend . . . on whether the recipient's own operations

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[9] We thus need not decide the character of the Centers for Disease Control or mass-media education project payments.

[10] The National Institute on Drug Abuse "supports over 85 percent of the world's research on the health aspects of drug abuse and addiction." National Institute on Drug Abuse, *Welcome to the NIDA Website, at http://www.drugabuse.gov/NIDAWelcome.html* (last visited May 17, 2002). Part of its mission "is to ensure the rapid and effective dissemination and use of the results of that research to significantly improve drug abuse and addiction prevention, treatment, and policy." *Id.* Distribution of funds is authorized under 21 U.S.C. § 1177 (1994).

are one of the reasons for maintaining the program. . . . Other cases may present questions requiring further examination and elaboration of the term 'benefits.'" 529 U.S. at 681-82 (emphasis added).

One of the Institute's goals in making grants is to "insure care of good quality, in general community facilities." 21 U.S.C. § 1177(f).[11] Under its contract with the Municipality, Health Services was "the exclusive source of AIDS counseling and professional services in San Juan . . . supplying AIDS services under a federally financed program." Dubón-Otero, No. 97-091, slip op. at 10.[12] Therefore, the Institute

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[11] Congress has authorized the Secretary of Health and Human Services, "acting through the National Institute on Drug Abuse," to make grants and "enter into contracts with individuals and public and private nonprofit entities" in order to provide "educational programs, technical assistance for the development, demonstration, and evaluation of drug abuse prevention, treatment, and rehabilitation programs," and in so doing to "accord a high priority to applications for grants or contracts for primary prevention programs." 21 U.S.C. § 1177(a). The Secretary is to "require coordination of all applications for programs." § 1177(c). Projects and programs for prevention and treatment services are subject to specific requirements. They should, "whenever possible, be community based, insure care of good quality in general community care facilities . . . and be integrated with, and provide for the active participation of, a wide range of public and nongovernmental agencies, organizations, institutions, and individuals." § 1177(f). "[W]here a substantial number of the individuals in the population served by the project or program are of limited English-speaking ability[, they should] . . . utilize . . . outreach workers fluent in the language spoken," and "identify an individual who is fluent both in that language and English" to provide guidance to individuals of limited English-speaking ability. *Id.*

[12] The contract with the Municipality provides in pertinent part that:

> The Municipality must hire the services of a company with personnel that has the experience and professional knowledge necessary to design, establish, direct and manage the AIDS program of San Juan . . . . [Health Services] will utilize the equipment located at the facilities provided by the Municipality . . . . Epidemiological services will be provided in order to establish a state of alertness of

would naturally intend its monies to assist Health Services in providing AIDS care, much as Medicare monies assist hospitals in providing patient care.

It makes no difference that Health Services received this money indirectly. It is now well established that benefits under § 666 are not limited solely to primary target recipients or beneficiaries. *See Fischer*, 168 F.3d at 1278 ("[T]he plain language of § 666(b) does not distinguish between an organization . . . that receives 'benefits' directly under a federal program and an organization . . . that receives 'benefits' as an assignee under a federal program."); *cf. Fischer*, 529 U.S. at 677-78 ("Medicare operates with a purpose and design above and beyond point-of-sale patient care."). Health Services' contract with the Municipality contemplated a relationship between Health Services and the United States Government, and those operating federal assistance programs like the Institute are well aware that recipients of program funds use subgrants and subcontracts to further effectuate the program's goals. Lawrence Poole, a grants manager for the United States Department of Health and Human Services,[13] testified that "a grant award [that] is issued by an agency could and does in fact translate into subcontracts or subgrantee relationships with other organizations." Poole further testified

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> the disease as well as counseling and treatment to the patients. The epidemiological activities shall be coordinated with the respective state and federal authorities. . . . [Health Services] will establish an educational program for the community in order to create public conscience especially to high risk groups. . . . The population at large will be educated regarding prevention of AIDS and the different methods of transmission.

[13] The Department of Health and Human Services encompasses the National Institute on Drug Abuse. Mr. Poole described his duties as administering individual discretionary grant programs geared primarily toward provision of health care in United States territories. He had been with Health and Human Services approximately thirty years and was very familiar with their federal grant programs.

that Health Services received federal funding as a subgrantee for the years of 1988 and 1989, and that "the requirements for each subgrantee or subcontract relationship are subject to the same requirements for accountability of federal funds and terms of the award as the actual grantee recipient of federal funds." We conclude that if the payments in *Fischer* were "made not simply to reimburse," 529 U.S. at 679, then neither were the payments here.

III.

Dubón and Garib argue that the district court erred in denying their motions for acquittal for insufficient evidence. Pointing to the fact that the indictment charged them with conspiring to steal from Health Services, they assert the Government did not prove the crucial element of lack of consent of the corporation. They cite *United States v. Burbank* for the proposition that there can be no theft where "[n]o evidence [is] presented by the government to show that the transactions were not authorized by the corporation." 848 F.2d 453, 454 (4th Cir. 1988).[14] They contend Health Services' shareholders and board of directors consented to the transactions at issue and therefore there was no theft.

In reviewing a challenge to the sufficiency of the evidence, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315

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[14] Because we ultimately conclude that there was sufficient evidence for the jury to find a lack of valid authorization, Appellants' *Burbank* argument need not detain us. We have serious concerns about some of the broad language in *Burbank*, but it suffices to say that while it is one thing to decide that the consent of sole or co-owners can preclude conviction for interstate transport of stolen money (as was the case in *Burbank* under 18 U.S.C. § 2314 (2000)), it would be quite another to extend that holding to this case involving a conspiracy to embezzle or steal funds from an organization receiving funds from the federal government, especially given the attendant complexities of 18 U.S.C. § 666.

U.S. 60, 80 (1942); *see United States v. Mena-Robles*, 4 F.3d 1026, 1031 (1st Cir. 1993) (stating that the issue in a sufficiency challenge is "whether the evidence and reasonable inferences therefrom, taken as a whole and in the light most favorable to the prosecution, would allow a rational jury to determine beyond a reasonable doubt that the defendants were guilty as charged").

The Government presented evidence that between 1987 and May 1991 Dubón received $10,000 per month from Health Services as a legal retainer, although Health Services' board of directors had authorized a retainer of only $5,000. Someone had tampered with the original board minutes to show authorization for a monthly retainer of $10,000, allowing Dubón to funnel the additional $5,000 per month to Kourí. Specifically, the director of the word processing center where the minutes were transcribed testified that the original page of the minutes setting forth the retainer as $5,000 was replaced in another set of minutes with a page showing the retainer as $10,000. The page showing the retainer as $10,000 was a different consistency than the rest of the minutes and was not produced at the same word processing center. Corcino testified the additional $5,000 was going to Kourí to pay Kourí's home rent and credit card bills. Corcino further testified that Kourí could not be on Health Services' payroll because Kourí was under contract with the Harvard Institute for International Development, which in turn had a contract directly with the Municipality of San Juan.

The Government also presented evidence that Garib employed a personal housekeeper, as well as a secretary for his private practice, using Health Services' money. Corcino, Health Services' comptroller, testified that for a long time he was not aware that Health Services was paying for a private secretary and personal housekeeper for Garib, and that in his opinion such payments constituted an unauthorized diversion of Health Services funds for personal use. The housekeeper testified that the signature on the timesheets bearing her name

was not hers. The secretary testified that while she was paid by Health Services, ninety-nine percent of her time was spent on tasks related to Garib's private practice.

Finally, there was evidence at trial that Appellants also used Health Services assets to purchase political support, which Health Services was dependent upon for its funding. Before the San Juan mayoral election of 1988, Garib allegedly loaned a $19,000 video camera to one of the candidates, Jose Granados-Navedo. The camera had been purchased with a Health Services check. Garib and Kourí later met with Granados to discuss Health Services providing other financial support for his campaign.

To generate more cash, Garib, Sotomayor, and Corcino then met with Antonio Fernandez, the owner of IMA Productions, and presented him a Health Services check made out to IMA in the amount of $60,000 and signed by Garib and Sotomayor. Only some of this money was intended to pay for services performed by IMA. Garib asked Fernandez to endorse the check and cash it—or else write separate IMA checks payable to other persons who had not rendered services—so Garib could recover the excess in cash. Garib explained Health Services had an urgent need of cash to make certain payments that it could not make by company check. When Fernandez refused to participate, Garib stated that he had solved the problem in another way. Garib later met with Granados and gave him a box containing more than $100,000 in cash.

Granados lost the election. After the new administration assumed office, payments on the AIDS contract were delayed. Kourí later told Corcino that he had taken care of the problem by arranging for $5,000 a month to be paid to the candidate who had won the election, Mayor Hector Luis Acevedo, and $5,000 to the Director of the Health Department of the Municipality, Dr. Freddie Borras. Regular payments by the Municipality on the AIDS contract then

resumed. The $10,000 monthly payments were raised by cashing Health Services checks issued to persons who had performed no services. Several of these checks were signed by Garib and Dubón. Dubón's law firm was also involved in cashing a series of these Health Services checks at Dubón's direction, with at least one of the checks being issued to Dubón's son, who had performed no services. Toward the end of 1990 Dubón told Corcino, "I am not going to sign for that [expletive] any longer." He did not, however, object to the continued diversion of the funds.

Viewing this evidence in the light most favorable to the Government, as we must, we conclude that a rational jury could find beyond a reasonable doubt that Dubón and Garib were participants in a conspiracy to use Health Services funds to pay personal expenses and make political payoffs as charged in the indictment. The evidence of informal alterations of the board minutes as a means to funnel funds to Kourí, of the apparent use of a forged signature to divert Health Services' funds to pay for Garib's personal housekeeper, of the use of a Health Services' employee to do work almost exclusively for Garib's private practice, and of the clandestine efforts to turn Health Services checks into cash are all evidence from which a jury could find that defendants "without valid authority" embezzled, stole, or obtained by fraud money or property.

IV.

Dubón and Garib challenge a number of the district court's decisions regarding jury instructions. We address each in turn, recognizing that when alleged errors involve particular instructions' adequacy in explaining the law, as they do here, "[w]e must look at the entire charge, in light of the evidence, and determine whether, taken as whole, the court's instructions fairly and adequately submitted the issues in the case to the jury." *United States v. Woodward*, 149 F.3d 46, 69 (1st Cir. 1998).

A.

The district court denied defendants' requested jury instructions, including instructions which required the Government to prove that the actions of defendants were designed to "cheat Health Services," that Health Services was the "victim," and that authorization by Health Services was thus a defense.[15] Instead, the district court instructed the jury that it was sufficient to find that the funds at issue were "something of value in excess of $5,000 in connection with federal funding" and "under the care, custody or control" of Health Services.

We conclude the district court did not err in its instructions to the jury. The district court instructed that theft involved taking property without authority and that embezzlement involved taking property under one's control belonging to another.[16] Its further instructions that there was a crime if the

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[15] One of the requested instructions said that "to act with intent to defraud means to act knowingly with the intent or the purpose to obtain, deceive, or cheat [Health Services] out of money or property." There was also a request to instruct the jury that

> The government must prove beyond a reasonable doubt that [Health Services] did not authorize the expenditure. One of the ways by which a corporation can authorize a payment is by the board of directors. If the board of directors of Advanced Community Health Services authorized an expenditure, then this expenditure was not theft or embezzlement.

Other instructions were requested, but since they all embody variations of the same theme as the ones above, we need not set them all out.

[16] The district court instructed:

> Embezzlement is the fraudulent appropriation of property with [sic] one properly entrusted with its possession.
>
> It is to willfully convert to one's own use, without authority, another's money and property, of which the wrongdoer acquired possession validly, of [sic] some office, employment or position of trust.

money or property stolen "was owned by or was under the care, custody, or control of [Health Services]," was proper in light of our discussion above in Part I. The instructions taken as a whole fairly and adequately informed the jury of the applicable law.

B.

Dubón and Garib argue the district court erred by refusing to instruct the jury on the requested definition of federal benefits. We have already set out the applicable law as to what constitutes federal benefits under § 666 in Part II above.

Dubón and Garib requested the following instructions: (1) Not every payment by the federal government to an organization constitutes federal "benefits" as required by the statute; (2) Federal money paid to a private corporation as payment of fees for services already rendered by the corporation does not qualify as federal benefits; (3) Payments made by the federal government to a private corporation as part of an ordinary commercial transaction do not qualify as federal benefits; (4) Money paid to a corporation is a federal benefit if the corporation was required to "administer" the money under an agreement with the government or to "disburse" the money to others. The district court, meanwhile, tracked the statutory language in instructing the jury.[17]

> Theft, also known as larceny, is the act of stealing or taking of property without the owner's consent. It is the fraudulent taking of personal property for [sic] money belonging to another from his possession or from the possession of some person holding the same for him without his consent, with an intent to deprive the owner of the value of the same and to appropriate it to the use or benefit of the person taking it.

[17] The district court instructed the jury that in order for them to return a guilty verdict, Health Services must have received

> in any one-year period benefits in excess of $10,000 under a federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance or other form of federal assistance. This section [666] does not apply to bona fide salary, wages, fees, or other com-

Cf. United States v. Paradies, 98 F.3d 1266, 1289 (11th Cir. 1996) (concluding there was no plain error in district court's failure to instruct on an element of § 666, where the instructions "tracked the statutory requirements" and the evidence at trial was sufficient for a jury to find the element in question satisfied).[18]

We conclude the first three of the requested instructions were adequately covered by the district court when it instructed the jury that "legitimate, valid, bona fide salary, wages, fees, or other compensation paid or expenses paid or reimbursed in the ordinary course of business" did not constitute benefits. As to the fourth requested instruction, Dubón and Garib direct us to no authority supporting such a definition of federal benefits under § 666, nor do we believe that such is a complete statement of the law in this respect.[19] We cannot conclude that there is error in refusing an offered

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pensation paid, or expenses paid or reimbursed in the usual course of business.

The district court reiterated this element of § 666 later.

[18] Dubón and Garib cite *Marmolejo*, 89 F.3d at 1189, for the proposition that "[t]he plain language of § 666 is ambiguous in defining 'Federal Program' and 'Federal Assistance,'" and therefore more was required than mere recitation of the statutory language. However, there can be little doubt that the National Institute on Drug Abuse (which we have concluded is the source of the federal benefits at issue here) is a federal assistance program. Thus, even if we were to find error in the district court's failure to define "federal program" and "federal assistance" in its instructions, such error would be harmless. *See Bastien v. Goddard*, 279 F.3d 10, 16 (1st Cir. 2002) (instructional error "entitles appellant to a new trial on his claim only if it had a prejudicial effect").

[19] Garib acknowledges the requested instructions were written "so that the jury could differentiate between the payments Health Services received in 1989 (which were not 'benefits'), and the federal grants it received after February 1991 (which were 'benefits')." Since we have already concluded that Health Services did receive benefits in 1989, the requested instructions buckle under their own weight.

instruction where we are left to speculate as to an appellant's legal underpinning for the proposed instruction. One may argue that *United States v. Rooney*, 986 F.2d 31 (2d Cir. 1993), provides some support. In that case the Second Circuit stated that "[i]n each of the cases [enumerated by the Senate Report to illustrate situations § 666 is intended to include], the organization . . . provided the Federal government with a service by administering a government program." *Id.* at 35 But that discussion of legislative history was dictum, since the court there had already concluded that benefits were present on the basis of § 666's statutory language. *Id.* at 34. More importantly, a court's refusal to instruct in the language of an appellate opinion does not justify reversal. *See Kent v. Smith*, 404 F.2d 241, 244 (2d Cir. 1968) ("[I]t is generally not helpful to take quotations from the opinions of appellate courts, that were never intended to be used as instructions to juries, and submit these in the form of requests to charge.").

We are aware that the Supreme Court in *Fischer* stated that "[t]o determine whether an organization participating in a federal assistance program receives 'benefits,' an examination must be undertaken of the program's structure, operation, and purpose." 529 U.S. at 681. The record before us demonstrates that evidence was before the jury relevant to these issues, and the district court, in ruling on the motion for acquittal, expressly analyzed these issues.[20] The district court did not err in instructing the jury in this respect.

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[20] The district court stated:

> Defendants' requests are premised upon their enduring contention that federal money paid to a private corporation which performs a service for the government can not constitute federal benefits.
>
> We have disagreed, and continue to disagree, with such a contention. To summarize, we find that [Health Services] was not in a purely commercial relationship with the federal government. First, the contract between the Municipality of San Juan and [Health Services] provided that [Health Services] was to be the exclusive

C.

Dubón and Garib argue that the district court erred by refusing to instruct the jury that it could only return a verdict of guilty on the basis of conduct occurring after Health Services first received federal benefits. The requested instruction stated:

> An expenditure that occurred before [Health Services] ever received any federal benefits is not a violation of 18 U.S.C. section 666. The government must prove that the defendant agreed to an unauthorized expenditure or expenditures that occurred after [Health Services] received federal benefits. Therefore, if the defendant agreed only to an expenditure or expenditures occurring before Health Services received any federal benefits, you must find the defendant not guilty of count 1.

The district court denied this request.

The relevant statutory language states: "[T]he circumstance [that must exist for there to be a federal crime] is that the organization . . . receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." § 666(b). The statute further defines one-year period as "a continuous period that commences no

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source of AIDS counseling and professional services in San Juan and that the Municipality maintained administrative and supervisory roles over [Health Services]. This fact alone clearly indicates more than a commercial relationship. Moreover, we find that the contractual relationship itself is a form of a federal assistance, supplying AIDS services under a federally financed program. *See United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) ("[O]rganizations engaged in contractual relationships with the federal government would fall within the scope of [section 666], if those 'contractual relationships constitut[ed] some form of Federal assistance.'") (internal citations omitted). We instructed the jury accordingly.

Dubón-Otero, No. 97-091, slip op. at 10-11.

earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense." § 666(b)(5).

Garib now argues the instruction given by the district court allowed the jury to return a guilty verdict on the basis of conduct occurring before Health Services received any federal money at all, much less federal benefits.[21] For instance, the jury could have found Garib guilty on the basis of conduct occurring only in 1988 (before Health Services received any federal monies), added twelve months to get into 1989 (when Health Services received over $10,000 in federal funds), and thus satisfied the instruction. Garib argues federally criminalizing his 1988 conduct in that way would exceed the government's authority under the Spending Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 1. *See Fischer*, 529 U.S. at 689 (Thomas, J., dissenting) ("We have held that the spending power requires, at least, that the exercise of federal power be related 'to the federal interest in particular national projects or programs.'") (quoting *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)); *United States v. Zwick*, 199 F.3d 672, 687 (3d Cir. 1999) ("Applying § 666 to offense conduct, absent evidence of any federal interest, would appear to be an unconstitutional exercise of power under the Spending Clause.").

In support of his contention that the jury could have found him guilty based solely on 1988 conduct, Garib points to the Government's argument to the jury in summation:

> And you will recall that Mr. Poole testified that on January 10 of 1989, federal funds were received through

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[21] Because Dubón's conduct all involved 1989, and because we have already concluded that there was indeed sufficient evidence for the jury to find that Health Services had received federal benefits in 1989, we only need to consider this argument as it pertains to Garib.

> that grant. And you will recall that that grant was in excess of $10,000. And why is that date important? Because, as the judge will instruct you on what the law is for federal program fraud, the government has to prove that $10,000 were received in any one calender [sic] year period either before or after the commission of the offense. And if you take the date of January 10th of 1989 and go back one year, it takes you to January 10th of 1988, close to the date on which [Health Services] was created.

Garib and Dubón requested a special verdict that would have required the jury to identify what conduct it was basing its verdict on, but the Government objected, and the district court did not submit a special verdict form.

The Government responds that the indictment charged a conspiracy beginning in 1989 and that the jury was instructed accordingly. It argues the 1988 conduct was only presented to show the existence of a conspiracy. It further argues that even if 1988 conduct was a basis for the jury's verdict, there in fact was federal interest in the form of pending contracts. Finally, the Government argues any error was harmless because the jury found that a conspiracy existed, that Dubón's conduct occurred in 1989, and that Garib, as a co-conspirator, was responsible for that conduct.

We conclude there was no error. To begin with, the instruction requested by Dubón and Garib was not a correct statement of the law, because what the Government had to prove was that the defendants agreed to join a conspiracy to steal from Health Services and that an overt act in furtherance of that conspiracy occurred after § 666 became applicable. The requested language was simply too narrow. Most importantly, however, the district court's instructions as to the scope of the indictment properly limited the jury:

> So let's now talk about conspiracy. For you to find a defendant guilty of conspiracy, you must be convinced

> that the government has proved each of the following elements beyond a reasonable doubt.
>
> First, that between in or about *January of 1989* up to and including February of 1994, the agreement specified in the indictment and not some other agreement or agreements existed between at least two of the defendants charged in the indictment; and second, that the defendants Luis Dubon and Jorge Garib each willfully joined in that agreement; and third that at least one of the conspirators committed at least one overt act in the an [sic] effort to further the purpose of the conspiracy.

(Emphasis added.)

As for the Government's argument to the jury in summation, it was not the subject of a timely objection and we will not say it was plain error to permit it.[22] *See Chute v. Sears Roebuck and Co.*, 143 F.3d 629, 630 (1st Cir. 1998) ("[T]he court of appeals will consider a forfeited objection only if an error was committed, if the error was 'plain' (i.e. clear under current law), if the error was prejudicial, and if review is needed to prevent a miscarriage of justice.") (citing *United States v. Olano*, 507 U.S. 725, 733-37 (1993)).

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[22] Garib also points to the district court's reimbursement order following the conviction as evidence of the district court's alleged confusion on this issue. In that order, the district court required Garib to repay the federal government for losses it incurred as a result of Garib's conduct in 1988. Even if we were to agree that the reimbursement order suggests a misunderstanding of the law on the part of the judge, it does not invalidate the judge's instructions. The judge need not be correct in his reasoning, so long as he was correct in his decision being challenged on appeal. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.").

V.

Garib challenges his perjury conviction. *See* 18 U.S.C. § 1623 (imposing punishment on anyone who, under oath in any proceeding before any grand jury, knowingly makes any false material declaration). Garib's perjury charge stems from testimony he gave before the grand jury. As part of that testimony he denied giving political contributions, or loaning a video camera, to Granados. He also denied asking Fernandez to sign a $60,000 check so Garib could generate cash. Garib now argues he was denied a fair trial on his perjury charge for two reasons. First, he argues that by improperly instructing the jury as to § 666's "one-year-period" and Health Services' authorization defense, the court effectively directed a verdict as to materiality. Because we have concluded above that the district court's instructions on these matters were not improper, Garib's argument on this first point must fail. Second, Garib argues the district court's instructions as to perjury removed the Government's burden of proving the falsity of the statements at issue. The district court instructed the jury that:

> In order to sustain its burden of proof for the purpose of making a false declaration before the federal grand jury as charged in Count Thirty-five of the indictment, the government must prove the following four essential elements beyond a reasonable doubt. One, that the defendant Jorge Garib gave testimony under oath before a federal grand jury; number two, that the defendant Jorge Garib made *the false material statement* as detailed in the indictment during that testimony; three, the defendant Jorge Garib knew that the statements were false when he gave the testimony; and four, that the statement or representation was material, meaning that it had a natural tendency to influence or was capable of

> influencing a decision or an action, whether or not it actually influenced or deceived anyone. I also instruct you that truth is a defense to perjury.

(Emphasis added.) We see no error in the district court's instructions because they adequately covered the Government's burden of proof. *See United States v. Watson*, 623 F.2d 1198, 1204 (7th Cir. 1980) (upholding similar instruction).[23]

VI.

Finally, Dubón and Garib challenge the makeup of their jury and the appointment of the interim United States Attorney.

A.

Dubón and Garib argue that their right, as criminal defendants, to a petit jury selected from a fair cross-section of the community, *see Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) ("the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial") (citing also 28 U.S.C. § 1861), is denied in Puerto Rico by the exclusion of potential jurors who are not proficient in English—an exclusion which they allege systematically excludes the poor. We previously held a similar challenge to be unavailing in *United States v. Benmuhar*, 658 F.2d 14 (1st Cir. 1981). Dubón and Garib seek to distinguish *Benmuhar* as having been decided in part upon the absence of any viable alternative, while here

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[23] Garib raises three other arguments, which we conclude are without merit. As phrased in his brief, they are: "The District Court's Flawed Instructions On § 666 Propelled The Prosecutor To Argue That Dr. Garib Had A Motive To Lie To The Grand Jury"; "The District Court's Endorsement Of The Flawed Theory Of Prosecution Invited The Prosecutor To Assail Dr. Garib's Character And Prejudice His Right To A Fair Trial"; "The Cumulative Effect Of The District Court's Errors Deprived Dr. Garib Of A Fair Trial."

they suggested simultaneous translation. However, we stated in *United States v. Flores-Rivera*, that it is "the overwhelming national interest served by the use of English in a United States court," which "justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language." 56 F.3d 319, 326 (1st Cir. 1995) (quoting *United States v. Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir. 1990)). This justification is independent of the presence or lack of any viable alternatives. Accordingly, we reject Appellants' contention.

B.

Dubón and Garib challenge the appointment of interim United States Attorney Guillermo Gil as statutorily and constitutionally defective. As Appellants themselves recognize, this issue has been definitively resolved in the Government's favor. *United States v. Hilario*, 218 F.3d 19, 22 (1st Cir. 2000).

VII.

Accordingly, we affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2029

UNITED STATES

Appellee

v.

LUIS E. DUBON-OTERO

Defendant-Appellant

No. 00-2030

UNITED STATES

Appellee

v.

JORGE L. GARIB -BAZAIN

Defendant-Appellant

Before Boudin, *Chief Judge*, Gibson,* *Senior Circuit Judges*, Torruella,** Selya, Lynch, Lipez and Howard *Circuit Judges*.

ORDER OF COURT

Entered: July 23, 2002

We construe appellants' petitions for rehearing en banc as petitions for panel rehearing and for rehearing en banc. The

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* Of the Eighth Circuit, sitting by designation.

** Judge Torruella is recused from these matters.

petitions for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petitions for rehearing and petitions for rehearing en banc be *denied*.

By the Court:
Richard Cushing Donovan, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

cc: Messrs. Srebnick, Roman, Hafetz, Friedman, Klumper, Vega-Pacheco

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Criminal No. 97-091 (JAF)
Order No. 45

UNITED STATES OF AMERICA,
Plaintiff,

v.

YAMIL H. KOURI-PEREZ (01);
JEANNETTE SOTOMAYOR VAZQUEZ (02),
Defendants.

[Filed Jan. 25, 1999]

MEMORANDUM ORDER

Pursuant to *Order No. 16*, dated February 27, 1998, *Docket Document No. 272*, this court confirmed having previously ordered the Clerk of Court to comply with the provisions of 28 U.S.C. § 1867(f) under the Jury Selection Act of 1968, 28 U.S.C. §§ 1861-1869, and *United States v. Royal*, 100 F.3d 1019, 1023-26 (1st Cir. 1996). On January 20, 1999, codefendants Kourí-Pérez and Sotomayor-Vázquez filed a motion to dismiss the indictment and to stay proceedings, *Docket Document No. 537*.

The defendants request, pursuant to 28 U.S.C. § 1867 and Fed. R. Crim. P. 6 (b)(2), the dismissal of the indictment and a stay of proceedings until such date as the court implements the provisions of Chapter 121, 28 U.S.C. §§ 1861-1872, regarding grand and petit jury selection. Movants assert that there has been substantial failure to comply on the part of this

District with the jury selection statutes in violation of the Sixth Amendment to the United States Constitution. The specific claim is that by requiring that jurors be conversant in the English language, this court "fails to recognize that the English language requirement systematically biases the jury pools towards the higher brackets of income distribution [and] systematically excludes 91% of the population which is otherwise eligible to serve as jurors in federal court; [discriminating] against the majority of the resident population of Puerto Rico." *Docket Document No. 537 at 3.*

Movants propose that court proceedings in this District continue to be conducted in English, permitting non-English speaking jurors to form part of the pool of eligible jurors and that these Spanish speaking jurors be provided with simultaneous translation of proceedings into Spanish.

This type of claim has been duly considered by both this District Court and the Court of Appeals for the First Circuit, which has foreclosed the issue. *United States v. Flores-Rivera*, 56 F.3d 319, 325 (1st Cir. 1995). Even if the statistical accounts proposed by movants are accurate, resulting in a smaller pool of eligible jurors and a systematic exclusion of Spanish-speaking/non-English speaking jurors in the jury selection process, the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District Court of Puerto Rico in English, as is traditionally done in federal courts, and requiring jurors to be proficient in that language. *See Miranda v. United States*, 255 F.2d 9, 17 (1st Cir. 1958) (the court found it essential that judge, counsel, and all the jurors "[h]ave a working knowledge of [English] if the judicial machinery is to function effectively"); *United States v. De Jesús Boria*, 518 F.2d 368, 371 (1st Cir. 1975) ; *United States v. Ramos-Colón*, 415 F. Supp. 459 (D.P.R. 1976); *United States v. Benmuhar*, 658 F.2d 14, 17-20 (1st Cir. 1981); *United States v. Aponte Suárez*, 905 F.2d 483, 491-92 (1st

Cir. 1990), and *United States v. Flores-Rivera*, 56 F.3d 319, 325-26 (1st Cir. 1995), cited in chronological order. *See also* Chief Judge Levin H. Campbell's Statement on the Issue of Language in the Puerto Rico Federal District Court and Judge Stephen G. Breyer's Statements on Behalf of the Judicial Conference of the United States before the Committee on Energy and Natural Resources, U.S. Senate, 101st Congress, 1st Session, July 11, 1989.

Lastly, we note that federal case law has never held that the Constitution requires venires to be, statistically, a substantially-true mirror of the community. While courts speak in terms of "fair cross-section," they have realized that practical reasons, as well as the sterility of such an endeavor, militate against total realization of this ideal. *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985).

It is a fact that not all citizens otherwise duly qualified can serve as jurors in this District on account of not being conversant in the English language. However, since a true cross-section of the community proposed by movants cannot be practically attained and in a context where the community or the District Court do not actively prevent people from serving or actively discriminate against non-English speakers, this court must deny the requested relief in line with First Circuit precedent.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 25th day of January, 1999.

/s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Criminal No. 97-091(JAF)

UNITED STATES OF AMERICA,
Plaintiff,

v.

LUIS E. DUBON-OTERO (10), and
JORGE L. GARIB-BAZAIN (11),
Defendants.

[Filed Oct. 27, 1999]

OPINION AND ORDER

Defendants, Luis Dubón-Otero ("Dubón") and Jorge Garib-Bazaín ("Garib") are charged with conspiracy to commit theft of federal funds through Advanced Community Health Services ("ACHS") pursuant to 18 U.S.C. § 371.

Defendants move for: (1) a change of venue or, in the alternative, a continuance and individual *voir dire* of prospective jurors; (2) certain particulars from the government; (3) dismissal of the forfeiture counts against them; (4) dismissal of the indictment and a stay of this case until the provisions of 28 U.S. C. § 1861 are complied with in selecting the grand and petit juries; and (5) government preclusion from calling as a witness any person to whom the government has offered anything of value.

I.

Brief History

On February 19, 1999, a grand jury returned an indictment charging Defendants Dubón and Garib and nine others with conspiracy to commit theft concerning a program receiving federal funds in violation of 18 U. S. C. § 371. The indictment alleged that Defendants conspired to steal federal monies through ACHS. Defendants Dubón and Garib were also indicted on forfeiture counts pursuant 18 U. S. C. § 982, and Defendant Garib was charged with making false declarations before the grand jury pursuant to 18 U.S. C. § 1623.

On March 11, 1998, we began the first phase of the trial ("AIDS I") involving Defendants Yamil H. Kourí-Pérez, Jeannette A. Sotomayor, and Armando Borel-Barreiro. The jury convicted all three defendants on June 14, 1999.

The second phase of the trial, the trial of Defendants, was scheduled to commence on October 18, 1999.

* * * *

V.

Dismissal of the Indictment and a Stay

Defendants move for dismissal of the indictment and a stay until the provisions of 28 U S. C. § 1861 are complied with in selecting the grand and petit juries in this case. Specifically, Defendants allege that the federal jury selection process in Puerto Rico illegally discriminates against people with lower incomes in violation of 28 U. S. C. § 1681 and the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI.

We have previously addressed this issue in this very case. *See Docket Documents Nos. 537 and 540.* We, accordingly, decline to revisit it here.

* * * *

VII.

Conclusion

We DENY Defendants' motion for a change or venue or a continuance due to adverse pretrial publicity; DENY Defendants' motion for certain particulars; GRANT Defendants' motion to dismiss Count 34; DENY Defendants' motion to dismiss the indictment pursuant to 28 U.S. C. § 1861; and DENY Defendants' motion to preclude the government from calling as witnesses any person to whom they have offered anything of value. This Opinion and Order disposes of *Docket Document Nos. 985 and 1015.*

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of October, 1999.

/s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U. S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Criminal No. 97-091 (JAF)

UNITED STATES OF AMERICA,
Plaintiff,

v.

LUIS DUBON-OTERO (10), JORGE L. GARIB-BAZAIN (11),
Defendants.

[Filed Jan. 11, 2000]

OPINION AND ORDER

Defendants, Luis Dubón-Otero and Jorge Garib-Bazaín, are charged with conspiracy to commit theft of federal funds through Advanced Community Health Services ("ACHS") pursuant to 18 U.S.C. §§ 317 [*sic*] and 666. Defendants move for us to preclude the prosecution from introducing evidence concerning the alleged conspiracy to violate 18 U.S.C. 666 prior to, at the earliest, September 28, 1990. Specifically, Defendants allege that: (1) even if federal funds were paid to the municipality of San Juan ("Municipality") and then to ACHS, this is not a valid basis for federal jurisdiction; and (2) the prosecution has failed to provide Defendants with any discovery documents that evidences such payments.

I. Relevant Facts

On January 19, 1988, ACHS and the Municipality entered into a contract to establish and operate an AIDS program in

San Juan through the Health Alliance. The contract specified that "Health Alliance is defined as the contractual agreement with private groups to provide various medical, supplementary and counseling services all the while maintaining its administration as municipal function." *See Docket Document No. 1110, p. 3.* The contract further stated that "ACHS shall establish, operate and manage the AIDS Institute of San Juan." *Id.* The contract also contained provisions which explicitly limit ACHS' responsibilities to "the performance of professional services," *id.*, while the Municipality retained administrative duties.

II. The Program Fraud Statute

The Program Fraud Statute, 18 U.S.C. § 666, which is part of the Comprehensive Crime Control Act of 1984, prohibits the unlawful theft of anything of value of $5,000 or more by an agent of an organization that is subject to the statute. 18 U.S.C. § 666. "Section 666 was designed to prevent diversions of federal funds enroute to their intended beneficiaries." *United States v. LaHue*, 170 F.3d 1026, 1028 (10th Cir. 1999). Section (b) delineates which organizations are subject to the statute and provides:

> The circumstances referred to in subesction (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract subsidy, loan guarantee, insurance, or other form of Federal assistance.

18. U.S.C. § 666 (b).

This section has created a split among the federal circuits over the issue of determining at what point the federal money ceases being federal. *Compare LaHue*, 170 F.3d at 1026; *United States v. Wyncoop*, 11 F.3d 119 (9th Cir. 1993), *with United States v. Fischer*, 168 F.3d 1273 (11th Cir. 1999)

United States v. Zyskind, 118 F.3d 113 (2d Cir. 1997); *United States v. Marmolejo*, 89 F.3d 1185 (5th Cir. 1996). In other words, the troubling contention is how many hands can the money pass through and still retain its federal character? Neither the Supreme Court nor the First Circuit has directly addressed the issue. Nonetheless, the Supreme Court has found that section 666's "expansive, unqualified language, both as to the bribes forbidden and *the entities covered*, does not support the interpretation that federal funds must be affected to violate § 666 (a)(1)(B)." *Salinas v. United States*, 118 S. Ct. 469, 473 (1997) (determining whether alleged bribery must affect or involve federal funds).

Moreover, the plain language of the statute indicates that its breadth is not circumscribed to agencies and organizations that were the direct beneficiaries of federal funds. *See Zyskind*, 118 F.3d at 116 (noting that section (b) "uses the word 'receives,' rather than the phrase 'is a beneficiary of . . . Nothing in this language suggests that § 666 does not reach thefts by an agent of an organization that receives federal program moneys and administers those moneys for the benefit of program beneficiaries'"); *United States v. Dransfield*, 913 F.Supp. 702 (E.D.N.Y. 1996) ("The statute does not explicitly state that an agency must directly receive $10,000 in benefits under a Federal program."); *but see LaHue*, 170 F.3d at 1029 (finding that provider of medical services who was assigned Medicare reimbursements from patients did not receive federal benefits within meaning of section 666); *Wyncoop*, 11 F.3d at 121 ("Congress did not intend, however, to make misappropriations of money from every organization that receives indirect benefits from a federal program a crime.").

As all the Circuits have done, we next look to the legislative history of section 666 for guidance. *Id.*, at 474 ("Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language.")

(internal quotations and citations omitted). The stated purpose of the statute is to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S. REP. NO. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3812, 3511; *see also Salinas*, 118 S. Ct. at 469; *United States v. Foley*, 73 F.3d 484, 489 (2d Cir. 1996) ("By enacting section 666, Congress plainly decided to protect federal funds by preserving the integrity of the entities that receive the federal funds rather than requiring the tracing of federal funds to a particular illegal transaction."); *United States v. Rooney*, 37 F.3d at 847 (2d Cir. 1994). The legislative history further provides:

> The term 'Federal program' means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more that $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime.

S. REP. NO. 98-225, at 370. Based upon this notation, numerous courts have concluded that section 666 does not apply to purely commercial transactions. *See United States v. Copeland*, 143 F.3d 1439 (11th Cir. 1998); *Marmolejo*, 89 F.3d at 1190-91; *Rooney*, 986 F. 2d at 34; *United States v. Stewart*, 727 F.Supp. 1068 (N.D. Tex. 1989).

III. Analysis

Through our traversal of case law, we did not find any cases that are factually similar to the one at hand. Thus, we are left to forge our own path. We begin by exploring the exact posture of this case. The prosecution alleges theft of federal program funds through ACHS. ACHS received the

allegedly federal funds from the Municipality of San Juan which received the funds from the federal government. We are left to determine whether those funds which ACHS received were federal funds under section 666.

Defendants contend that the funds lost their federal character upon reaching ACHS. Defendants reason that simply because money may begin as federal funds, it does not retain that character forever. In other words, Defendants claim that the money lost its federal character when it reached ACHS because that was the point in which an entity received funds in return for services for which the entity had no duty to administer or disburse the funds. The prosecution retorts that ACHS was an agent of the Municipality who received benefits exceeding $10,000 under a Federal program and therefore was covered under 18 U.S.C. § 666.

First, we need to determine whether ACHS is an "organization, government, or agency" within the meaning of 18 U.S.C. § 666. Section 666 defines government agency as "a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program." 18 U.S.C. § 666(d)(2). As noted previously, in the contract between ACHS and the Municipality, ACHS was created to "establish, operate and manage the AIDS Institute of San Juan." ACHS was created precisely for the purpose of serving the AIDS community of the Municipality. In essence, ACHS was a corporation subject to control of the Municipality for the execution of the AIDS program.

Furthermore, the Municipality is a political subdivision of the Commonwealth of Puerto Rico created to administer local government functions. In this way, the Municipality is an

agency of the government with the contractual obligation of providing federal funds to pay ACHS for services it provided to AIDS patients of the Municipality pursuant to 18 U.S.C. § 666. In the legislative history, Congress explicitly states that it intends to use the definition of agent provided in the statute and not to incorporate other definitions already available. *See* S. REP. NO. 225, 98th Cong., 2d Sess. 369-70, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11 ("[t]he term[] 'agent' . . . [is] defined in subsection (d) and require [s] no further explication."). The contract affirms this stance by assigning administrative duties over the Institute to the Municipality and the duty to provide professional services to ACHS. Therefore, ACHS was a "corporation" established by the government in accordance with section 666(d)(2) "subject to control, by a government or governments for the execution of a governmental or intergovernmental program." 18 U.S.C. § 666(d)(2). Moreover, the contract specifies that ACHS was subject to the government's control as to the type of services provided and the class of persons to which the services would be provided. In this same way, ACHS "executes" a government program in accordance with section 666(d) (2) because the Municipality created ACHS to administer AIDS services to the citizens of the Municipality. We find that ACHS is, within the broad ambit of 18 U.S.C. § 666, a government agency and is, therefore, a protected entity under the statute.

Defendants also argue that ACHS was not the direct recipient or beneficiary of the federal funds and, hence, jurisdiction under section 666 is lacking. In other words, ACHS is an indirect recipient of federal funds, and, as such, we lack federal jurisdiction over the alleged activities. We find Defendants' argument to be unavailing. A plain reading of section 666 indicates that Congress did not intend only direct recipients to be liable. *See* 18 U.S.C. § 666; *see also Zyskind*, 118 F.3d at 113 (affirming conviction of administrator of home for disabled adults after reasoning that

even indirect recipients may be eligible under section 666); *United States v. Roberts*, 28 F.Supp.2d 741, 746 (E.D.N.Y. 1998) (holding that city's receipt of federal funds and subsequent distribution through a municipal department was sufficient to satisfy jurisdiction under section 666); *Dransfield*, 913 F.Supp. at 709, *aff'd*, 104 F.3d 350 (2d Cir. 1996) ("The legislative history indicates that it is the recipient of federal funds, rather than the direct receipt of such funds from their original source, that is relevant for purposes of Section 666.").

We, likewise, find Defendants' argument that section 666 is inapplicable because the Municipality paid ACHS for services already rendered to be without merit. Defendants are basically asserting that the Municipality and ACHS had a purely commercial relationship and that the Municipality was merely paying for services already rendered. We find that the contract belies this argument. The contract provided that ACHS was to be the exclusive source of AIDS counseling and professional services in San Juan and that the Municipality maintained administrative and supervisory roles over ACHS. This is clearly more than a commercial relationship. However, even if we were to adopt Defendants' stance and assume that the Municipality had no control over ACHS, we still find Defendants' argument fails to apply to this case because the contractual relationship itself is a form of a federal assistance, supplying AIDS services under a federally financed program. *See United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) ("[O]rganizations engaged in contractual relationships with the federal government would fall within the scope of [section 666], if those 'contractual relationships constitut[ed] some form of Federal assistance.'") (internal citations omitted).

Lastly, we find Defendants' case factually different from the two cases upon which they rely. In *Wyncoop*, the institution was a private college that neither received nor

administered federal funds. ACHS, on the other hand, received and then internally administered federal funds under the supervision of the Municipality. In addition, in *Wyncoop*, the type of benefits received were more attenuated because they consisted of the indirect benefit to the college from the increased enrollment of students receiving federal funds. In the instant case, ACHS received the direct benefit of the federal funds by receiving them and then administering the funds to pay for the provision of counseling services to the Municipality's AIDS patients.

In the other case upon which Defendants rely, the court focused on the fact that the Medicare patients and not their providers were the "target recipients" of Medicare "benefits." *LaHue*, 170 F.2d at 1185-86. In that scheme, patients could opt to pay either their health care providers and then seek reimbursement from Medicare or to assign their benefits to their providers directly who then collect their fees from Medicare. *Id.* at 1185. The emphasis in *LaHue* is on the fact that once funds reach the intended recipient, they cease to be "benefits" for section 666 purposes. In this same way, Defendants assert that the funds at issue ceased to be federal in nature since they were paid from the Municipality to ACHS.

We find our case to be markedly different. In both *LaHue* and *Wyncoop*, the courts concentrated on the fact that the federal funds had reached their individual beneficiaries before being misappropriated. *See Id.*, at 1027; *Wyncoop*, 11 F.3d at 120. In the instant case, the federal funds were still in the administrative system at the time of the alleged misappropriation. They had not been disbursed to individual program recipients. Thus, we find Defendants' reliance upon the *Wyncoop* and *LaHue* to be misguided and inapplicable to this case. *See Dransfield*, 104 F.3d at 350; *United States v. Fischer*, 168 F.3d 1273 (11th Cir. 1999) (refusing to adopt

LaHue's reasoning and holding that the language of section 666 did not mandate such a direct/indirect determination).

IV. Discovery Issue

Defendants assert that the prosecution should be precluded from introducing evidence of federal funds paid directly to ACHS in 1988 and 1989 since they have not provided Defendants with any documents evidencing such payments during discovery. We, however, find this issue to be moot as the prosecution has informed us that there is no evidence available to show ACHS' direct receipt of federal funds during 1988 and 1989 that had not been previously provided to Defendants. Therefore, there was no additional evidence to be discovered.[1]

V. Conclusion

In accordance with the foregoing, we DENY Defendants' motions. This Opinion and Order disposes of *Docket Document Nos. 1089, 1110, and 1124.*

IT IS SO ORDERED.

San Juan, Puerto Rico, this 11th day of January, 2000

/s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U. S. District Judge

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[1] We note that the issue of whether there is additional evidence or not of federal funds being paid to ACHS in the years 1988 and 1989 has no bearing on the sufficiency of the indictment as the charging document.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Criminal No. 97-091 (JAF)

UNITED STATES OF AMERICA,
Plaintiff,

v.

LUIS E. DUBON-OTERO (10) and
JORGE L. GARIB-BAZAIN (11),
Defendants.

[Filed March 3, 2000]

OPINION AND ORDER

On February 11, 2000, a jury convicted Defendants Jorge Garib-Bazain ("Garib") and Luis Dublin-Otero ("Dubón") for their participation in a conspiracy to embezzle federal program funds through Advanced Community Health Services ("ACHS") pursuant to 18 U.S.C. § 666 (1994). Defendant Garib was also convicted of perjury pursuant to 18 U.S.C. § 1623(a) (1994).

Defendant Garib moves for a judgment of acquittal, arrest of judgment, or a new trial pursuant to Fed. R. Crim. P. 29, 33, and 34. Specifically, Defendant Garib alleges that: (1) we instructed the jury erroneously; (2) we lacked subject matter jurisdiction over the conspiracy charge in the indictment; (3) the indictment failed to state a federal offense; (4) we erroneously admitted evidence in the form of allegedly-altered ACHS Board of Directors' Minutes; (5) we erred in

not granting Defendant's pretrial motion for a change of venue and, thus, the prejudicial publicity prior to and throughout the trial viloated his Sixth Amendement rights to an impartial adjudication, U.S. CONST. amend VI; and (6) we should have dismissed his indictment because interim United States Attorney Guillermo Gil's appointment is unconstitutional.

Defendant Dubón moves for a new trial pursuant to Fed. R. Crim. P. 33, due to: (1) our erroneous denial of his motion for change of venue; and (2) overwhelming pretrial publicity. Defendants join the relevant portions of each other's motions.

I.

Legal Standards

A. *Federal Rule of Criminal Procedure 29*

A motion pursuant to Rule 29 tests the legal sufficiency of the evidence against a defendant. *See Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979). A court must direct acquittal "if the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29(a). In ruling on a Rule 29 motion, the court "must take the evidence in the light most favorable to the government" and must deny the motion if "taking the facts and the reasonable inferences therefrom, a rational jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Lema*, 909 F.2d 561, 569 (1st Cir. 1990); *United States v. Rivera-Santiago*, 872 F.2d 1073, 1078-79 (1st Cir 1989); *United States v. Paone*, 758 F.2d 774, 775 (1st Cir. 1985) (finding that same standard applied to circumstantial evidence cases). A judgment of acquittal terminates the prosecution, and double jeopardy attaches which bars further proceedings against the defendant for the same offense. *See Fong Foo v. United States*, 369 U.S. 662, 671 (1962).

B. *Federal Rule of Criminal Procedure 33*

A motion for a new trial pursuant to Rule 33 may be granted, upon motion by the defendant, if the trial court finds a new trial is "required in the interests of justice." FED. R. CRIM. P. 33. Trial courts exercise wide discretion in ruling on Rule 33 motions. *See United States v. Leach*, 427 F.2d 1107, 1111 (1st Cir. 1970). They, however, should consider the harmless error standards of FED. R. CRIM. P. 52 and deny the motion unless the substantial rights of a defendant were impaired. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (finding that if the error involved denial of a constitutional right, a new trial is required unless the error was harmless beyond a reasonable doubt).

Prejudicial publicity which is harmful to a defendant is a ground for a new trial pursuant to Rule 30, *see, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965), but the mere existence of publicity does not, in itself, require a new trial. *See Patton v. Yount*, 467 U.S. 1025, 1035 (1984). The real issue is whether the defendant was prejudiced by the publicity. *See United States v. Anguilo*, 897 F.2d 1169, 1180 (1st Cir 1990). In making such a determination, the trial court has substantial discretion. *See United States v. Drougas*, 748 F.2d 8, 29 (1st Cir. 1984).

C. *Federal Rule of Criminal Procedure 34*

Pursuant to Rule 34, a court may arrest judgment in two circumstances: (1) when the indictment fails to charge an offense; or (2) when the court lacks jurisdiction over the offense charged. *See* FED. R. CRIM. P. 34. In determining a motion for arrest of judgment, a court may only consider the record, which includes the indictment, the plea, the verdict, and the sentence. *See United States v. Sisson*, 399 U. S. 267, 281-82 (1970)

II.

Analysis

For efficiency's sake, we shall combine and discuss Defendants' contentions in the context of the three legal standards we have outlined above.

A. *Rule 29 Contention*

Defendant Garib alleges that we incorrectly admitted evidence that constituted unreliable hearsay of a codefendant. Defendant Garib maintains that admission of the ACHS Board of Directors' Minutes ("Minutes") violated his confrontation rights and impermissibly prejudiced him by falsely implicating his participation in fraudulent contracts.

We disagree with Defendant's contention because we find that the Minutes are business records of a corporation.[1] The Board of Directors' Minutes of a corporation constitute the records of regularly-conducted business activity, thereby qualifying as a hearsay exception. *See* FED. R. EVID. 803(6). We find that the Minutes constitute a business record because they documented what transpired at the Board meetings; they were transcribed by Dubón's secretary close in time to the actual meetings; Dubón's secretary testified at trial; they were transmitted by codefendant Dubón, a person with knowledge; and they were regularly kept in the normal course of operations at ACHS. The fact that some minutes may have

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[1] A business record is a

> [m]emorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness.

FED. R. EVID. 803(6).

been doctored while in the control of Dubón does not make them less admissible in the context of this trial.

B. *Rule 33 Contentions*

Defendant Garib contends that we erroneously instructed the jury on a number of matters, and both Defendants maintain that we erroneously denied their motions for a pretrial change of venue which resulted in overwhelming prejudice that infected the impartiality of the trial.

Specifically, Defendant Garib alleges that we erroneously instructed the jury on: (1) jurisdiction with regards to receipt of federal finds under 18 U.S.C. § 666; (2) the definition of federal benefits under section 666; (3) the definition of authorized transaction by a private, for-profit corporation; (4) the statute of limitations' defense to section 666; and (5) the burden of proof in a perjury prosecution.

We begin by looking to the source of Defendant Garib's allegations. Prior to the conclusion of trial, both Defendants and the Prosecution submitted proposed jury instructions. After consideration of the proposals, we held three conferences with the attorneys in this case to discuss the jury instructions. All of the issues Defendant Garib is now raising were addressed and dealt with during those conferences.

Defendant's main contention seems to be the fact that we did not accept, verbatim, his proffered jury instructions. We are not obligated to do so. While it may constitute reversible error for a court to refuse to instruct the jury on a defendant's properly presented and accurate theory of the case, *see United States v. Leach*, 427 F.2d 1107, 1112 (1st Cir. 1970), "a court is under no compulsion to accept faulty instructions." *Id.* at 1113. Nor must a court adopt a defendant's proffered instruction in the precise language suggested, *see United States v. Coast of Maine Lobster Co.*, 557 F.2d 905 (1st Cir. 1977), even if it is a correct statement of the law. *See United*

States v. Grissom, 645 F.2d 461 (5th Cir. 1981); *United States v. Linn*, 438 F. 2d 456 (10th Cir. 1971). The crucial issue surrounding jury instructions is whether, "[t]aken as a whole, the charge was fair and impartial." *Leach*, 427 F.2d at 1112; *see also United States v. Barham*, 595 F.2d 231 (5th Cir. 1979) (finding no error in trial court's refusal to submit defendant's requested theory of defense instruction where actual instructions given impartially presented defendant's theory of the case). In this context, we address Defendant's allegations in turn.

1. *Jurisdiction Pursuant to Section 666*

Defendant Garib alleges that based upon the guilty verdict as to the perjury charge, the jury must have made factual findings that he participated in events which occurred in 1988, a time in which ACHS had not received federal funds. Therefore, Defendant maintains that we failed to instruct the jury on the proper jurisdictional parameters of section 666.

2. *Definition of Federal Benefits Pursuant to Section 666*

Defendants allege that since ACHS was a private, for-profit corporation, the federal funds received were the property of the owners of ACHS, a group that included Defendants. As such, Defendants maintain that the monies ACHS received did not constitute a federal benefit under section 666, and no federal offense could have occurred because the owners of the corporation were disbursing their own money. Furthermore, Defendants contend that they were operating under a fee-for-services agreement with the government, which precludes a finding of federal benefits.

This is not new ground. We have been dealing with these issues since Defendant Garib moved to dismiss his indictment and both Defendants moved to preclude the Prosecution from introducing evidence on similar grounds. Additionally, we spent a large portion of time during the jury instructions

conferences addressing these issues. Nevertheless, we will briefly summarize our determinations in an effort to preserve the record fully.

Defendants' proposed jury instructions regarding federal benefits provided:

> Not every payment by the federal government to an organization constitutes federal "benefits" as required by the statute. Federal money paid to a private corporation as payment or fees for services already rendered by the corporation do not qualify as federal benefits. Similarly, payments made by the federal government to a private corporation as part of an ordinary commercial transaction do not qualify as federal benefits. Money paid to a corporation is a federal benefit if the corporation was required to "administer" the money under an agreement with the government or to disburse" the money to others.

See Docket Documents Nos. 1209 and 1225. Defendants, requests are premised upon their enduring contention that federal money paid to a private corporation which performs a service for the government can not constitute federal benefits.

We have disagreed, and continue to disagree, with such a contention. *See Docket Document. No. 1066.* To summarize, we find that ACHS was not in a purely commercial relationship with the federal government. First, the contract between the Municipality of San Juan and ACHS provided that ACHS was to be the exclusive source of AIDS counseling and professional services in San Juan and that the Municipality maintained administrative and supervisory roles over ACHS. This fact alone clearly indicates more than a commercial relationship. Moreover, we find that the contractual relationship itself is a form of a federal assistance, supplying AIDS services under a federally financed program. *See United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) ("[O]rganizations engaged in contractual relation-

ships with the federal government would fall within the scope of [section 666], if those 'contractual relationships constitute[ed] some form of Federal assistance.'") (internal. citations omitted). We instructed the jury accordingly.[3]

Finally, we find Defendants' proposed jury instructions to be incorrect as a matter of law in this case. The second sentence ("Federal money paid to a private corporation, as payment or fees for services already rendered by the corporation do not qualify as federal benefits") is legally flawed as applied to the facts of this case. *Cf. United States v. Nichols*, 40 F.3d 999 (9th Cir. 1994) (finding federal statute included theft from organizations that provide government with some form of *quid pro quo*).

3. *Definition of Authorized Transactions by a Private, For-Profit Corporation*

This issue was the most hotly debated topic of our jury instruction conferences. Defendants maintain that since ACHS was a private, for-profit corporation during the relevant times for the indictment, the Board could authorize any expenditure and it would be legal.

Once again, we disagree. The relevant inquiry under section 666 is not who holds the authority, but rather whether the authority that is exercised is valid. Defendants refuse to

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[3] The jury instruction provided:

> To prove fraudulent embezzlement and theft, the government must prove the following elements beyond a reasonable doubt:
>
> . . . .
>
> Fifth, that the San Juan AIDS Institute and/or Advanced Community Health Serves, in a one-year period, received benefits of more than $10,000 under any Federal organization involving a grant, contract subsidy, loan guarantee, insurance or other assistance.

Docket Document No. 1226.

acknowledge this selfevident fact, but that does not make it any less meaningful.

Congress enacted section 666 to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery. S. REP. NO. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3812, 3511; *see also United States v. Foley*, 73 F.3d 484, 489 (2d Cir. 1996) ("By enacting section 666, Congress plainly decided to protect federal funds by preserving the integrity of the entities that receive the federal funds rather than requiring the tracing of federal funds to a particular illegal transaction."). To assert that if an entity was a private, for-profit corporation, as long as the Board, or whomever is the proper person, authorizes a particular expenditure it is necessarily legal, completely thwarts the purpose for which Congress enacted the statute.

Put another way, if the entire Board was corrupt, Defendants argument would find that any action taken by it, even if contrary to the statutory purpose of section 666, is legal. We do not ascribe to such a view. *Cf. United States v. Salinas*, 654 F.2d 319, 328 (5th Cir. 1981) ("[W]hile valid consent by a bank's board of directors may be a defense to a charge of misapplication, no such board can vitiate a fraud on the bank. Thus, if the [defendants] . . . had an intent to defraud 'approval of the board of directors is no longer material to whether there was a misapplication of bank funds.'"). Rather, we agree with the Fifth Circuit's assessment in a similar situation:

> Patently an entire bank board, acting unanimously, could not without violating the statute invest bank funds to purchase a boatload of marijuana or make a loan secured only by a chattel mortgage on a kilogram of cocaine. Approval by the bank is a factor, indeed an important one, to be considered in deciding whether the making of the loan itself constituted a misapplication and whether a

> defendant had the intent to injure or defraud the bank required to sustain a conviction . . . [b]ut it is not a complete defense.

Id. at 1354. Therefore, while Board authorization may go to Defendants' intent, it does not insulate the Defendants from all blame.

Simply stated, if a den of thieves authorizes an illicit action, the action does not gain legitimacy by the fact that the authorization was performed by the proper persons. Rather, the proper inquiry is whether the authorization was valid or legitimate, *i.e.*, not contrary to the purposes of section 666 and, therefore, not illegal. This is necessarily so because a person or body, even by the most formal procedure possible, cannot authorize theft or embezzlement without violating the law. *See United States v. Stout*, No. 89-317-1-2-3, 1990 WL 136341, at *25 (E.D. Pa. Sept. 18, 1990) (citing *United States v. Cauble*, 706 F.2d 1322, 1353 (5th Cir. 1983)). Accordingly, we instructed the jury that the government had to prove beyond a reasonable doubt that "defendants, knowingly and without valid authority, embezzled, stole or obtained by fraud, some money or property." Docket Document No. 1226.[4]

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[4] Defendant Garib's proposed jury instructions erroneously asserted, in relevant part:

> To prove theft under 18 U.S.C. section 666, the government must prove that the expenditure was made without the consent of those who had the authority to approve the expenditure.

Docket Document Nos. 1209 and 1225; and Defendant Dubón's proposed jury instruction also incorrectly stated, in relevant part:

> If the Board of Directors of Advanced Community Health Services authorized an expenditure, then this expenditure was not theft or embezzlement.

Docket Document No. 1224.

4. *Statute of Limitations Defense to Section 666*

Defendant Garib contends that our failure to instruct the jury that "a defendant's declaration of innocence when questioned by law enforcement, by itself, is not evidence of a defendants continued participation in the conspiracy," constitutes grounds for a new trial. We did not give this instruction in the manner proposed by Defendant Garib because we fully covered the withdrawal defense in our instructions.[5] Defendant Garib was seeking to have us expand upon the withdrawal instruction. We declined to do so, and now find that there was no error in our decision. *See Maine Lobster Co.*, 557 F.2d at 905; *Grissom*, 645 F.2d at 461; *Linn*, 438 F.2d at 456.

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[5] The relevant instruction provided:

> It is a defense to the charge of conspiracy to comfit theft concerning programs receiving federal funds in Count One of the indictment that defendant Jorge L. Garib-Bazaín withdrew from the conspiracy before February 18, 1994.
>
> In order to withdraw from the conspiracy defendant Garib must take some definite, decisive, and affirmative action to disavow himself from the conspiracy or to defeat the goal or purpose of the conspiracy.
>
> Merely stopping activities or cooperation or merely being inactive for a period of time is not sufficient to constitute the defense of withdrawal.
>
> In deciding if defendant Garib took a step to disavow or defeat the conspiracy, you may consider several factors including whether the defendant intentionally alerted law enforcement to the conspiracy, whether the defendant told others in the conspiracy that his participation had ended, whether the defendant took steps to correct prior assistance to the group, and whether the defendant attempted to remedy any past act, or attempted to prevent any further progress of the conspiracy.

Docket Document No. 1226.

5. *Burden of Proof in a Perjury Prosecution.*

Defendant Garib correctly notes that we instructed the jury that they needed to determine whether Defendant had "made the false material statements as detailed in the indictment," *see id.*, and, further, that truth is a defense to perjury. However, Defendant is incorrect in alleging that we did not instruct the jury that the Prosecution had the burden of proving the falsity of the statements. While Defendant Garib is correct concerning the allocation of the burden, we did not err in our instruction. In relevant portion, we instructed:

> [T]he government must prove the following four essential elements beyond a reasonable doubt:
>
> One: The defendant, Jorge L. Garib-Bazaín, gave testimony under oath before a federal grand jury;
>
> Two: The defendant, Jorge L. Garib-Bazaín, made the false material statements as detailed in the indictment during that testimony;
>
> Three: Defendant, Jorge L. Garib-Bazaín, knew that the statements were false when he gave the testimony; and
>
> Four: The statement or representation was material, meaning that it had a natural tendency to influence or was capable of influencing a decision or an action, whether or not it actually influenced or deceived anyone.

Docket Document No. 1226. We find this to instruct the jury adequately as to 18 U.S.C. § 1623(a). *See United States v. Watson*, 623 F.2d 1198, 1204-05 (7th Cir. 1980) (finding similar charge adequately covered burden of proof issue).

6. *Prejudicial Publicity*

Defendants allege, pursuant to Rule 33, that we erred in denying their motion for a change of venue due to adverse prejudicial publicity prior to and throughout their trial. We

have thoroughly examined the adverse publicity issues in our previous opinion and the show.[6] Finally, during jury deliberations, Defense counsel again brought a questionable broadcast of the same show to our attention. We noted that it would have been impossible for the jurors to have heard the live broadcast as they were still involved in trial matters at the time it was aired, and again counseled that we were without power to control what the media aired.

The above situations constitute the only two instances of publicity, other than daily newspaper reports covering factual issues of the trial, which occurred during this trial. The jury was insulated from the media throughout the course of this trial, including during the airing of the two objectionable *Ojeda Sin Límite* broadcasts. Consequently, we do not find that Defendants were prejudiced in any way by this publicity.

C. *Rule 34 Motions*

Defendant Garib maintains that we lacked subject matter jurisdiction over the conspiracy charge alleged in Count 1 of the indictment, and both Defendants allege that the indictment failed to state a federal offense. We deal with these issues in turn.

Defendant Garib contends that the jury erroneously made factual findings that he had participated in events which occurred prior to ACHS' receipt of federal money and, therefore, no federal jurisdiction exists over the conspiracy count. This is not new ground as this issue really goes to the definition of a one-year period under section 666, which we have previously explored at length. *See supra* II (B)(1).

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[6] We note that this was the only avenue for us to explore as we perceive any attempt at preemptively silencing the media as a restraint which unconstitutionally chills free speech in violation of the First Amendment. U.S. CONST. amend. I.

Finally, Defendants allege that the indictment fails to state a federal offense because any monies paid, during the relevant periods of the indictment, to ACHS were fees paid to a private corporation in return for services rendered. We also have explored this argument fully. *See supra* II(B)(2). Accordingly, Defendants' Rule 33 motions are denied.

D. *Challenge to the Authority of the Interim United States Attorney*

Defendant Garib renews his challenge to the authority of interim United States Attorney Guillermo Gil, in light of the recent opinion issued from another court in this district. *See United States v. Fermín Hilario,* Crim. No. 96-0016 (CCC) (D.P.R. Feb. 11, 2000). We deny Defendant's motion and refer to our full explication in *United States v. Luciano del Rosario,* Crim. No. 99-097 (JAF) (D.P.R. Feb. 25, 2000).

III.

Conclusion

In accordance with the foregoing, we DENY Defendants' motions for judgment of acquittal, arrest of judgment and/or a new trial pursuant to Fed. R. Crim. P. 29, 33, and 44. This Opinion and Order disposes of *Docket Documents Nos. 1238 and 1241.*

IT IS SO ORDERED.

San Juan, Puerto Rico, this 3rd day of March, 2000.

/s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U.S. District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Criminal No. 97-91 (JAF)

UNITED STATES OF AMERICA,
Plaintiff,

v.

YAMIL H. KOURI-PEREZ, *et al.*,
Defendants.

AFFIDAVIT IN SUPPORT of MOTION TO DISMISS INDICTMENT AND MOTION TO STAY

Dr. Elías R. Gutiérrez, being duly sworn, says:

1. I am the econometrician retained by Dr. Yamil H. Kourí-Pérez, defendant in the above-entitled action, and I subscribe this affidavit in support of the motion to stay proceedings.

2. On February 11, 1998, a superseding indictment was returned against defendant, Dr. Yamil H. Kourí-Pérez, for conspiracy to commit theft concerning a program receiving federal funds, theft concerning a program receiving federal funds and money laundering, in violation of 18 USC § 371,18 USC § 1956 (a)(1)(B)(i).

3. Defendant has entered his plea of not guilty to the offenses charged and is currently awaiting trial.

4. The procedures specified by the jury plan currently in effect in the District of Puerto Rico are:

All names of prospective jurors now contained in the master jury wheel for the District of Puerto Rico, of which there are 50,000 names, were selected from

voter registration lists of the precincts of the Commonwealth of Puerto Rico. The names from the master jury wheel are grouped into sets of 2,000 each. These persons are mailed juror qualification forms and all persons not meeting certain criteria are excluded. All persons then found to be qualified by the jury administrator at the time of this initial screening are summoned to a jury orientation/qualification session. At this session, the court interviews each person to ascertain his of her English proficiency. Once proficiency is determined, the person becomes part of the qualified jury wheel.

5. The procedures specified by the jury plan currently in effect in the District of Puerto Rico for the selection of names of prospective jurors, and the jury panel scheduled for duty this year, are not in accordance with the Sixth Amendment and the Jury Selection and Service Act of 1968, 28 USC § 1861, et seq, for the following reasons:

a. According to the 1990 United States Department of Commerce Census of Population and Housing, there was a total population of 3,522,000 for Puerto Rico, of which 3,219,765 persons five years and over spoke Spanish at home. Approximately one-half of the Spanish speaking population, eighteen years and older, are classified by the Census Bureau as unable to speak English.

b. Statistical evidence demonstrates that:

1. Differences in *economic status*, indicated by various measures among the resident population of Puerto Rico, distributed by census tracts, is found to be strongly associated with English language proficiency, with 95% level of confidence.

2. Differences in English ability among the resident population of Puerto Rico are found to be strongly associated with income, gender and scholastic achievement. The level of statistical confidence with which the results were obtained is at least 95%.

3. English language proficiency requirement established by the Puerto Rico Federal District Court, systematically biases the jury selection process towards the upper brackets of the income distribution of Puerto Rico's social structure.

4. Analysis based on US census data demonstrates that the income distribution in Puerto Rico is:

- in general, highly skewed;
- in particular, skewed to a higher degree against women than against men, and
- inequality increases in inverse proportion to the English language proficiency.

5. The methodology followed by the Court guarantees a fair geographic representation. However, due to the English language requirement, the jury selection process is unable to guarantee equal and fair chance of selection to low-income groups and even less to low-income women.

6. Given the socioeconomic characteristics of the population of Puerto Rico, the English language requirement results in a jury selection process that systematically discriminates against the majority of the resident population of the district.

c. Proficiency in English has a great effect on economic status. An analysis of the census data for Puerto Rico prepared by the office of the census

evidences the inverse relationship between English language ability and income inequality. For instance, under a ratio analysis, the following is clear:

1. According to census data obtained from a special cross-tabulation for Puerto Rico, there are twice (1.99) as many persons, that have incomes between $15,000.00 and $25,000.00 per year that speak English easily, than those with the same income but can speak English only with difficulty. This ratio increases to 3.7, for persons in the same income category, when compared to persons that are unable to speak English.

2. There are four times (4.08) as many persons, that have incomes between ($25,000.00 and $49,999.00 per year that speak English easily, than those in the same income category but can speak English only with difficulty. This ratio increases to 9.9, for persons in the same income category, when compared to persons that are unable to speak English.

3. The ratio of persons that are in the $54,000.00 or more income category that can speak English easily increases to 7.7 when compared to those in that income category that can speak English with difficulty. At that income category the ratio of persons that speak English easily to those that are unable to speak English reaches 14.3.

d. A statistical analysis of the completed jury questionnaires also shows bias in the educational attainment of potential jurors from the broader Spanish speaking population. An analysis of the 25,271 completed juror questionnaires shows that, of the respondents, 23.2% had an

educational level of high school or less and 76.8% had an educational level of some years of college. In contrast, the educational attainment for Spanish speaking persons 25 years and older living in households in Puerto Rico was 70.8% with high school or less and 29.3% with some years of college. Moreover, the educational attainment distribution for Spanish-speaking persons 25 years and over that speak English easily in Puerto Rico is as follows: 42.2% with high school or less, and 57.8% with some years of college. This reality is even more significant when due consideration is given to the fact that educational attainment positively correlates with economic status.

e. Contrary to 28 USC § 1861, 1862, and 1863, the jury plan and its implementation by the court does not presently ensure the random selection of a fair cross section of persons residing in the community in the District of Puerto Rico, but systematically excludes persons who are of the lower economic status and the less educated, by failing to recognize that the English language requirement systematically biases the jury pools towards the higher bracket's of income distribution and systematically excludes 91% of the population which is otherwise eligible to serves a jurors in federal court. The system does not provide fair representation of such groups of persons.

f. Due to the socioeconomic characteristics of the predominantly Spanish speaking population of Puerto Rico, the English language requirement results in a jury selection process that systematically discriminates against the majority of the resident population of Puerto Rico.

In San Juan, Puerto Rico, this 29 day of December 1998.

/s/ Elias R. Gutierrez
ELIAS R. GUTIERREZ

Affidavit number

Sworn and subscribed before me by Dr. Elías R. Gutiérrez, of legal age, married, economist and resident of San Juan, Puerto Rico, to me personally known, this 29 day of December, 1998.

[Seal]

/s/ Magda C. Morales Torres
NOTARY PUBLIC

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III of the Constitution of the United States provides in relevant part:

Section 2. . . .

> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18 U.S.C. § 666 provides:

> Theft or bribery concerning programs receiving Federal funds
>
> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
>
> (i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or

government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a sub-division of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

Title 28 U.S.C. § 1861 provides:

Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries by the district courts of the United States, and

shall have an obligation to serve as jurors when summoned for that purpose.

Title 28 U.S.C. § 1862 provides:

Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

Title 28 U.S.C. § 1865 provides:

Qualifications for jury service

(a) the chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, or the clerk under supervision of the court if the court's jury selection plan so authorizes, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and in any alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, or the clerk of court's jury selection plan so provides, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

The Jones Act, § 42, 39 Stat. 951, 956 (1917), as amended, 48 U.S.C. § 864, provides:

Appeals, certiorari, removal of causes, etc.; use of English language

The laws of the United States relating to appeals, certiorari, removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the United States District Court for the District of Puerto Rico and the courts of Puerto Rico.

All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language.